Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1407

MERCANTILE TRUST COMPANY NATIONAL ASSOCIATION,
Petitioner,

v.

ST. LOUIS COUNTY NATIONAL BANK, CLAYTON TRUST COMPANY, and WILLIAM R. KOSTMAN, Director of the Division of Finance for the State of Missouri,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

Mercantile Trust Company National Association ("Mercantile"), Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this action on December 16, 1976.

OPINIONS BELOW

The opinion of the District Court is unreported (June 18, 1976) and is reproduced in Appendix A. The opinion of the Court of Appeals is unreported (December 16, 1976) and is reproduced as Appendix B.

JURISDICTION

The judgment of this Court is invoked pursuant to 28 U.S.C. §1254(1). The jurisdiction of the District Court was founded on 28 U.S.C. §1331(a) in that the action was alleged to arise under the laws of the United States [12 U.S.C. §§36(c), (f) and 92a and 92b], and that the matter in controversy exceeded the sum or value of $10,000, exclusive of interest and costs.

The opinion of the Court of Appeals (a majority opinion of two judges and the dissenting opinion of one judge) was filed on December 16, 1976.

The petition of Mercantile and of Appellant Comptroller of the Currency of the United States ("Comptroller") for rehearing or for rehearing before the Court en banc was denied on January 31, 1977. Mercantile's petition was denied by a vote of five to three and the Comptroller's petition was denied by a vote of four to four. The order denying the petition for rehearing is reproduced in Appendix C. On February 11, 1977, the Court of Appeals, on Mercantile's motion, stayed its mandate for a period of thirty days from February 11, 1977 pending the filing by Mercantile of a petition for writ of certiorari in the Supreme Court of the United States. A copy of said order is reproduced as Appendix D. On March 9, 1977, the Court of Appeals, on Mercantile's motion, ex-

tended the stay of its mandate for an additional thirty days to and including April 12, 1977. A copy of said order is reproduced as Appendix E.

QUESTIONS PRESENTED

1. Whether Federal law [12 U.S.C. §36(f)] is operative and controlling on the threshold question of whether the trust office of Mercantile constitutes a branch?

2. Whether the trust office constitutes a "branch" within the meaning of Section 36(f) of the National Bank Act.

3. Whether Section 92a of the National Bank Act has any relevance to the threshold question of whether the trust office of Mercantile constitutes a branch under federal law?

4. Whether the policy of "competitive equality" between national and state banks applies if it is determined that the trust office is not a branch under federal law?

STATUTES INVOLVED

The pertinent provisions of the National Bank Act provide as follows:

12 U.S.C. §36(f)

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

12 U.S.C. §36(c)

"The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * * * * * *

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. * * *"

12 U.S.C. §92a

"The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located."

STATEMENT OF THE CASE

Preliminary Statement

The Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court. We believe that this is the first time that a Court has held that a branch exists under the federal definition of branch in the National Bank Act where the activity in question admittedly did not involve a place "at which deposits are received, or checks paid, or money lent" (12 U.S.C. §36(f)). The decision may have a serious impact on many activities performed by national banks away from their main offices that do not involve any of the three banking functions described in Section 36(f).

There is no controversy concerning the facts as the parties filed a Stipulation of Facts which is reproduced as Appendix D. The following is a condensed version of those facts.

Parties

Mercantile is a national banking association with its principal office at 721 Locust Street in the City of St. Louis, Missouri. Mercantile is engaged in the banking business and operates a trust department. Mercantile was granted fiduciary powers by the Comptroller on December 24, 1964.

Defendant James E. Smith was the Chief Administrator of the Office of the Comptroller of the Currency of the United States from the time when this case was commenced until his resignation on July 30, 1976. James E. Smith was the successor in office to William B. Camp who was in office at the time Mercantile established its trust office (Stip. ¶ 5, p. A 34).*

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* References to "A ...." are to the appendices annexed to this petition with the appropriate page number.

Respondent St. Louis County National Bank (County Bank) is a national banking association with its principal office at 8000 Forsyth Boulevard in Clayton, Missouri. County Bank is engaged in the banking business and operates a trust department. County Bank was granted fiduciary powers by the Board of Governors of the Federal Reserve System on August 31, 1946 (Stip. ¶ 1, p. A 33).

Respondent Clayton Trust Company (Clayton Trust) is a Missouri trust company with its principal office at 222 South Central in Clayton, Missouri. Clayton Trust opened for business on November 1, 1973, and it is engaged exclusively in the trust business (Stip. ¶ 3, p. A 33).

Respondent William R. Kostman is charged with the responsibility for the execution of the laws of Missouri relating to state banks, state trust companies and the state banking business. He is the successor in office to C. W. Culley who was in office at the time Mercantile established its trust office (Stip. ¶ 4, p. A 34).

Establishment of Trust Office

On February 2, 1970, Mercantile opened a trust office in the Pierre Laclede Center, 7733 Forsyth Boulevard in Clayton, Missouri. Clayton is a suburb of St. Louis and is an integral part of the St. Louis metropolitan area. The trust office is approximately three blocks away from County Bank and Clayton Trust (Stip. ¶ 11, p. A 36).

Prior to opening the trust office, Donald E. Lasater, then President and now Chairman of the Board and Chief Executive Officer of Mercantile, wrote a letter, dated May 21, 1969, to William B. Camp, then Comptroller of the Currency of the United States, and outlined the activities to be performed at the trust office. The letter stated Mercantile's position that the "proposed trust service office is not a branch within the meaning

of the National Banking Act," and that its establishment "would not require the approval of your office." Mercantile requested the Comptroller's concurrence in Mercantile's position and for the Comptroller's advice (Stip. ¶ 12, p. A 36).

By letter dated June 13, 1969, the Comptroller responded to Mercantile and advised that his office had no objection to the trust office "as long as you do not accept deposits, make loans, or pay checks at the location, thereby bringing it within the definition of a branch office as set forth in 12 U.S.C. 36(f)." The letter added that as long as the office "is not a branch office, no certificate is needed for its operation" (Stip. ¶ 12, p. A 36).

Mercantile leases the premises that house the trust office. On September 21, 1974, the trust office was moved from 7733 to 7701 Forsyth Boulevard in the Pierre Laclede Center (Stip. ¶¶ 13-14, p. A 6-7). A sign is attached to the premises reading "Mercantile Trust Company Trust Office" (Stip. ¶ 24, p. A 43).

The trust office is staffed with one officer of Mercantile as department head, two assistant trust officers, one trust representative, and a secretary. Their duties are to obtain new customers for the trust department of Mercantile (Stip. ¶ 19, p. A 39).

Activities at the Trust Office

As summarized in paragraph 18 of the Stipulation, Mercantile performs the following activities at its trust office (A-38):

(a) Consults with customers and prospective customers and their attorneys, accountants and life underwriters concerning the trust services which Mercantile renders;

(b) Discusses the accounts of principals and beneficiaries of existing trusts and agencies;

(c) Reviews various proposed instruments which contemplate use of Mercantile's trust services, and discusses

same with customers, prospective customers or their representatives;

(d) Provides convenient space for persons desiring to execute Wills, and sometimes acting as witnesses to Wills, which name Mercantile in a fiduciary capacity;

(e) Provides convenient space for persons desiring to execute Insurance Trusts, Living Trusts, Managing Agency Accounts and Custodian Accounts, which name Mercantile in a fiduciary capacity;

(f) Reviews existing Wills on file for present customers which Wills are filed at Mercantile's principal place of business at 721 Locust Street, St. Louis, Missouri; and

(g) Researches estate and trust problems and discusses same with customers and their representatives.

From the Spring of 1970 to about March, 1973, the overall administration of about 500 living and testamentary trusts, managing agency and safekeeping accounts were handled by a trust administrative officer at the trust office. Since the discontinuance of such activity in March, 1973, no administrative officer has been employed at the trust office and no accounts have been administered there (Stip. ¶ 20a, A-40).

No banking services are performed at the trust office. No checks are paid, no money lent and no deposits are received at the trust office. Such banking services are performed by Mercantile at its principal place of business in the City of St. Louis. Paragraph 17 of the Stipulation is as follows (A-38):

> No banking services are performed at Mercantile's trust office in Clayton. No checks are paid, no money lent, no deposits received at the trust office. No commercial banking personnel are connected with or employed at the trust office. Such banking services are performed by Mercantile at its principal place of business located at 721 Locust Street in the City of St. Louis, Missouri.

Mercantile maintains no permanent records at the trust office. Trust investment decisions, purchase and sale of securities, accounting services, safekeeping of assets for trust accounts, the receipt and delivery of securities and the disbursement of trust funds are handled at Mercantile's principal office in the City of St. Louis. On infrequent occasions, employees at the trust office received and receipted for assets from customers which were part of their trust estates. On the date of receipt, such assets were delivered by messenger to Mercantile's principal office in the City of St. Louis. From time to time, during the time that a trust administrative officer was at the trust office, checks for the disbursement of trust funds were written at Mercantile's principal office and delivered to the trust office for delivery from the trust office to the beneficiaries [Stip. ¶¶ 20(b) and (c), 21, A-41].

Customers of Mercantile execute and/or deliver wills, trust instruments and other fiduciary documents in the trust office. On occasions, trust officers assigned to the trust office sign trust documents at the trust office in the name of Mercantile. No trust document in which Mercantile is named as a fiduciary is signed by a trust officer at the trust office unless it is first reviewed and approved by review counsel of Mercantile at its Trust Department in downtown St. Louis. Following the signing of a trust document by an officer of Mercantile, Mercantile requires that the trust document be accepted by four Mercantile officers on a form called an acceptance sheet. The acceptance sheet may be and is sometimes partially signed at the trust office and is then sent to Mercantile's principal offices in the City of St. Louis for completion (Stip. ¶¶ 21-22, A-42).

Mercantile's trust office is not a separate corporation or legal entity, but is an office operated by Mercantile which operates its

main banking house in downtown St. Louis, Missouri. The trust office is a part of Mercantile's organization (Stip. ¶ 31, A-45).

On May 15, 1970, the Attorney General of the State of Missouri issued his opinion No. 207 directed to the Commissioner of Finance holding that the establishment of an office by a state chartered bank and trust company which has full trust powers separate and apart from the main banking facility at which its trust officers are available to the public constitutes the establishment of a branch and the establishment of such a branch is not permitted under Section 362.105 of the Revised Statutes of Missouri.

St. Louis Union Trust Company is a corporation organized under the Missouri laws relating to banks and trust companies with its principal office at 510 Locust Street in the City of St. Louis, Missouri. It is engaged in the trust business but does not exercise any banking functions. On June 3, 1970, St. Louis Union Trust Company made written application to the Missouri Commissioner of Finance for approval to lease and use premises in Clayton, Missouri for the conduct of specified activities. On or about June 10, 1970, the Commissioner of Finance notified St. Louis Union Trust Company of its disapproval of the request. Thereafter, St. Louis Union Trust Company filed suit in the Circuit Court of Cole County for review of the decision of the Commissioner of Finance; the litigation terminated with the decision of the Missouri Court of Appeals, Kansas City District, on April 2, 1973, reported in 494 S.W.2d 408. Motion for rehearing and/or transfer to the Missouri Supreme Court was denied on May 7, 1973 (Stip. ¶ 29, p. A45).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals in Holding That a Trust Office Where No Deposits Are Received or Checks Paid or Money Lent Is a Branch Under Section 36(f) of the National Bank Act Has Decided a Special and Important Question of Federal Law Not Heretofore Determined by This Court But Which Should Be Settled by This Court.

The Court of Appeals in a divided opinion has found a branch to exist under the federal definition of branch in Section 36(f) of the National Bank Act where the activity in question did not involve the receipt of deposits, the payment of checks or the lending of money.

The National Bank Act, in unequivocal terms, in defining the term "branch" as used in Section 36(f), states that the term "branch":

> "shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * *at which deposits are received, or checks paid, or money lent.*" (Emphasis added.)

The Court of Appeals held that Mercantile's trust office was a branch in the face of a Stipulation by all the parties that:

> "No banking services are performed at Mercantile's trust office in Clayton. *No checks are paid, no money lent, no deposits received at the trust office.*" (Emphasis added.)

We believe that this is a case of first impression in our courts. In the two more recent decisions of this Court relating to branching, one or more of the three foregoing banking functions were found to be present in the off-premise banking activity under review.

In *First National Bank of Logan, Utah v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966), two national banks were seeking to establish de novo bank offices in Utah. Utah law prohibited its state banks from branching except by taking over an existing bank. It was conceded that banking functions would be performed at the new offices and that they were branches under the federal definition of Section 36(f). The only issue was whether a national bank could establish a de novo branch in the face of Section 36(c) when a state bank could branch only by taking over an existing bank. This Court held that the two national banks were subject to the state law restrictions.

In *First National Bank in Plant City, Fla. v. Dickinson*, 396 U.S. 122 (1969), this Court concluded that on delivery of a sum of money to an armored truck or to a stationary receptable, the national bank providing such service had received a deposit at a place away from the main bank office. Thus, this Court said (l.c. 137):

> "Here, penetrating the form of the contracts to the underlying substance of the transaction, we are satisfied that at the time a customer delivers a sum of money either to the armored truck or the stationary receptacle, the bank has, for all purposes contemplated by Congress in § 36(f), received a deposit."

In the several recent cases, coming to this Court on petitions for writs of certiorari, involving the electronic customer bank communication terminals (CBCTs), one or more of the three banking functions enumerated in Section 36(f) were found to be present. This Court denied certiorari in all of those cases, e.g. *Independent Bankers Ass'n of America v. Smith*, 534 F.2d 921 (C.A.D.C. 1976), cert. denied 50 L.Ed.2d 141 (1976). Inasmuch as those cases involved one or more of the three banking functions enumerated in Section 36(f), they did not present to this Court the issue presented by this case.

The Court of Appeals in this case did not and could not have found that any one of the three banking functions enumerated in Section 36(f) were present for the plain reason that it was stipulated by all parties that none of the three functions is performed at the trust office. Thus, the Court of Appeals held that a facility which neither receives deposits, pay checks, or makes loans, can nonetheless be considered to be a branch bank within the definitional section of the National Bank Act, 12 U.S.C. 36(f). If *all banking functions* were included in the definition of "branch", no purpose would be served by listing the three traditional banking functions in Section 36(f). Congress did not intend the words—"deposits received, or checks paid, or money lent"—to be superfluous and that *any* function carried on by a bank away from its main office constitutes a "branch". If any banking functions were included in the definition, Congress could have simply said that a national bank can branch wherever a state bank can branch. It did not do so. The extensive discussion and analysis of the three banking functions by this Court in *Plant City* would have been totally unnecessary if any banking functions were included in the definition of branch.

As Judge Henley in his dissent in this case pointed out (A-23):

> "When the McFadden Act was passed in 1927, it was well known to Congress that the operation of trust departments and the furnishing of trust services was not an insignificant part of the business of banks, and I feel that if Congress had intended to include in its definition of a 'branch' a trust office such as the one involved in this case, it would have said so just as it specifically mentioned the accepting of deposits, the cashing of checks, and the lending of money."

Similarly, the District Court in *Continental Illinois National Bank and Trust Co. of Chicago, N.A. v. Lignoul*, (N.D. Ill., No. 76 C 2209, filed November 9, 1976), recently held that:

"If Congress had intended to include in the definition of a 'branch' any place where any business is transacted which is also transacted at the main office, it could have adopted that simple definition. But it clearly did not. The term 'include' in the statute does not relate to the activities involved but refers to the places at which the specified activities of receiving deposits, paying checks and lending money are carried out. These places may include branch banks, branch offices, branch agencies, additional offices, mobile trucks, electronic devices such as the CBCT's involved in the other cases or any other branch place of business at which 'deposits are received, or checks paid, or money lent.' " (Slip Opin., pp. 17-18.)

The above District Court case is the only case found involving off-premise trust activity. There the District Court, contrary to the decision in this case, squarely held that a trust department of a national bank is not a branch under Section 36(f).

The only explanation of the Court of Appeals' expansive reading of the federal definition of "branch" was the majority's zeal to maintain perfect competitive equality between state and national banks. Such result is demonstrably wrong and is in conflict with the applicable decisions of this Court.

II. The Court of Appeals Extension of the Policy of Competitive Equality to Invalidate a Trust Office Is in Conflict With the Applicable Decisions of This Court.

The division of opinion in the Court of Appeals in this case as well as the division of opinion on Mercantile's and the Comptroller's motions for rehearing reflects a sharp divergence of views among the judges of the Court on the extent of the application of the policy of competitive equality. That division in the Court of Appeals surfaced initially in the case of

Nebraskans for Independent Banking v. Omaha National Bank, 530 F.2d 755 (1976). The issue there was whether a drive-in/walk-in facility of the Omaha National Bank was an extension of the bank's main office or a detached branch not permitted under Nebraska law. The Court held the facility to be a branch. However, three judges were of the opinion that the majority opinion had, in determining whether a branch existed, misconstrued the deference owed to state law under the policy of competitive equality. This Court granted certiorari and vacated and remanded the case for reconsideration in light of subsequent Nebraska legislation that might bear on the outcome of the case. — U.S. —, 96 S.Ct. 2616, 48 L.Ed2d 658 (1976).

Judge William H. Webster in his dissent in the *Nebraskans for Independent Banking* case succinctly and accurately summed up the role of competitive equality in these terms (l.c. 765):

"Once a facility of a national bank has been determined to be a 'branch' under federal law, then state law may govern the 'how, where, and when' of its operation. That is the extent of competitive equality."

Judge Webster's conclusion is correct and represents a completely accurate and proper analysis of the decisions of this Court in *Plant City* and *Walker Bank*.

A. Federal law is controlling on the threshold question of whether a trust office constitutes a branch.

In this case, the majority, although expressly stating (A. 21) that it did "not rely on the State of Missouri's definition of branch in determining the content of branch in section 36(f)", its undue emphasis on the policy of competitive equality is tantamount to assigning an indispensable role to state law in its decision that the trust office was a branch.

The effect of the Court of Appeals' decision here is to allow state law to control what activities of a national bank will be defined as branching within each of the states. Thus, state governments are permitted to expand the application of anti-branching restrictions to banking activities not heretofore included in the federal definition. Such situation is contrary to the public interest. This Court in *United States v. Citizens and Southern National Bank*, 422 U.S. 86, 118 (1975), recently characterized the antibranching statutes in the following manner:

> "The obvious purpose and effect of a rigid antibranching law are to make the potential bank customers of suburban, small town, and rural areas a captive market for small unit banks."

In a footnote, this Court added (note 30):

> "The banking business is, of course, riddled with state and federal regulatory barriers to entry. See *United States v. Marine Bancorporation*, 418 US at 628-629, 41 L.Ed. 2d 978, 94 S.Ct. 2856. But most of these barriers—*e.g.*, chartering requirements—at least arguably serve the overriding public interest in maintaining customer confidence in the industry as a whole by assuring adequate financial stability and responsible management for all banks. Antibranching laws, on the other hand, are now widely recognized as a simple device to protect outlying unit banks from the rigors of regional competition."

The reasoning of the Court of Appeals in this case is contrary to the decision of this Court in *Plant City* and *Walker Bank*.

The decision of this Court in *Plant City* firmly established that in determining whether Mercantile's trust office is a branch, the only law to be considered is the federal law which contains its

own definition of "branch" in 12 U.S.C. § 36(f). Missouri law is wholly irrelevant to the issue of whether Mercantile's trust office is a branch.

If, as a matter of federal law, the trust office is a branch, then reference must be made to Section 36(c) which deals with the conditions under which a national bank may operate such branch. It is only in the context of Section 36(c) that competitive equality comes into play.

Plant City dealt squarely with the interplay of Sections 36(c) and 36(f) and the question of whether state or federal law determined what activity of a national bank would constitute branch banking. *Plant City* involved two kinds of services for the benefit of its customers. One such service was an armored car messenger service and the other an off-premise receptacle service for the receipt of packages containing cash or checks for deposit.

This Court stated the issue as follows (396 U.S. 122, 125):

> "The issue must be resolved by determining what constitutes a 'branch' or 'additional office'; *there is a threshold question of the extent to which this is governed by federal law.*" (Emphasis added.)

This Court's unequivocal answer to the threshold question was that it was governed by federal law (396 U.S. 122, 133-134):

> "We reject the contention made by amicus curiae National Association of Supervisors of State Banks to the effect that state law definitions of what constitutes 'branch banking' must control the content of the federal definition of § 36(f). Admittedly, state law comes into play in deciding how, where and when branch banks may be operated, Walker Bank, supra, for in § 36(c) Congress entrusted to the States the regulation of branching as Congress then conceived it. But to allow the States to define the content

of the term 'branch' would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in § 36 of a general definition of 'branch'. On this point the language of the Court of Appeals perhaps overstated the relation of state law to the problem, since the threshold question is to be determined as a matter of federal law, * * *."

Notwithstanding the plain import of the foregoing pronouncement of this Court that state law comes into play only in deciding "how, where and when" branches may be operated under Section 36(c), and that state law has no part to play in the definition of branch under Section 36(f), confusion continues. The time has come for this Court to settle the confusion that exists with respect to the extent of the application of the policy of competitive equality.

B. **The policy of competitive equality and state law is applicable only if under federal law a trust office is a "branch".**

If it is determined under federal law that the activity of a national bank falls within the parameters of the federal definition of a "branch" contained in Section 36(f), it is then necessary to look to state law to ascertain whether or not the establishment and operation of such branch is "authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively" as provided in Section 36(c). Thus, in *Plant City*, after holding that what constitutes a branch of a national bank is determined by the federal definition of "branch" in Section 36(f), this Court said (396 U.S. 122, 133):

> "Admittedly, state law comes into play in deciding *how, where, and when* branch banks may be operated, Walker Bank, supra, for in § 36(c) Congress entrusted to the

> States the *regulation* of branching as Congress then conceived it." (Emphasis added.)

In *Walker Bank*, two national banks in Utah applied to the Comptroller of the Currency for and received approval to open a new branch office in Logan and Ogden, Utah, respectively. There was no question but that both new offices constituted branches within the federal definition of "branch" in Section 36(f). Utah law permitted state chartered banks to establish a branch in the city or town in which the bank is located, but only by taking over an existing bank which had been in operation for not less than five years. The only question in the case was whether the Utah restrictions on branching by taking over an existing bank was applicable to national banks. Since the contemplated offices were admittedly branches under the federal definition of "branch" in Section 36(f), the issue arose under that part of Section 36(c)(1) which allows a national bank, with the Comptroller's approval, to establish a branch if "such establishment and operation are at the time expressly authorized to State banks by the law of the State in question". This Court held that a national bank, like a Utah state bank, could not establish a branch except by taking over an existing bank as provided by Utah law.

Plant City and *Walker* establish that once it is determined that the activity of a national bank constitutes a "branch" under Section 36(f), it becomes necessary for the Comptroller to look to state law, as provided in Section 36(c) to determine if such branch is at the time authorized to state banks, and if so, how, when and where and by what method may the branch be established. It is in this context that the policy of competitive equality comes into play.

It is clear from the foregoing that state restrictions and regulations on branching do not come into play as to national banks unless it is first determined that the proposed activity

of the national bank constitutes branching under the federal definition of "branch" in Section 36(f). As demonstrated above, the Court of Appeals, contrary to the teachings of this Court, injected state law and the policy of competitive equality in determining whether or not the trust office was a branch under the federal definition of branch in Section 36(f).

If under a proper construction the Mercantile trust office is not a "branch" under the federal law definition of "branch" in Section 36(f), the question of whether a Missouri trust company could open and operate a trust office under Missouri law is wholly irrelevant. Thus, it would be of no relevance that the St. Louis Union Trust Company, a Missouri trust company, lost in its effort to open and operate a trust office in Clayton, Missouri, *St. Louis Union Trust Company v. Pemberton*, 494 S.W.2d 408 (K.C. App. 1973).

III. **The Court of Appeals in Holding That Section 92a of the National Bank Act Is Relevant to Whether a Trust Office Is a Branch Decided a Special and Important Question of Federal Law Not Heretofore Determined by This Court But Which Should Be Settled by This Court.**

Section 92a of the National Bank Act (12 U.S.C. §92a) provides, in pertinent part:

> The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, *the right to act* as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver committee of estates of lunatics, or in any *other fiduciary capacity* in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located. (Emphasis added.)

It is plain on its face that Section 92a delineates the trust *powers* which the Comptroller of the Currency is authorized to grant national banks. The reference to state law in Section 92a is designed to limit the Comptroller's authority to grant trust powers to national banks that are possessed by state banks. The Section has nothing whatever to do with *where* such powers may be exercised. This is confirmed by the fact that what is now Section 92a was enacted before national banks were permitted to branch. Section 92a was first enacted in 1918 (40 U.S.Stat. 968), while national banks were granted the right to establish branches in 1927 by the McFadden Act (Ch. 191, §7, 44 Stat. 1228).

As Judge Henley said in his dissent in this case (A-24):

> While what is now § 92a authorizes national banks to offer fiduciary services to the same extent that they may be offered by state banks or trust companies, § 92a says nothing about *where* such services may be offered by national banks, nor does it limit the number of places at which such services may be offered. (Emphasis added.)

The District Court in *Continental Illinois National Bank*, supra, also held that:

> * * * [s]ection 92a of the National Bank Act simply authorizes national banks to engage in the various activities enumerated therein including activities which may be engaged in by state trust companies but does not amend the provisions of the McFadden Act with respect to branch banking; * * *. (Slip Opinion p. 12.)

Section 92a has nothing whatsoever to do with *where* fiduciary powers may be exercised. Nor has the section anything

to do with how, when and where a national bank may establish branches. Those conditions must be determined under Section 36 which deals with branching, not Section 92a which deals with the right to act in a fiduciary capacity. The majority opinion of the Eighth Circuit nullifies the plain meaning of Section 92a in finding such section relevant to the question of *where* fiduciary powers may be exercised. The majority opinion's interpretation of Section 92a is once again the result of the unwarranted emphasis assigned to state law and to the doctrine of competitive equality.

An authoritative judicial determination by this Court is greatly needed on the extent of the application of Section 92a as it relates to branching.

IV. The Decision of the Court of Appeals May Have a Serious Impact on the Maintenance by National Banks of Many Activities Conducted Away From Bank Premises.

The impact of the decision of the Court of Appeals extends beyond the operation of a trust office by a national bank. The conduct of banking activities, other than the receipt of deposits, payment of checks and the making of loans, by national banks in off-premises offices or by agents is widespread. Many national banks engage in a myriad of activities in facilities away from their main banking office. Such incidental banking activities are authorized by 12 U.S.C. 25 (Seventh).

One such off-premises activity that may be called into question is "loan production offices". A loan production office is a separate office established by a bank to solicit new loan business, service existing loans of the bank and to perform other activities incidental to the lending of money. In 1966, the Comptroller of the Currency ruled that loan production offices do not constitute branches under Section 36(f) of the National Bank

Act (Manual for National Banks, ¶7.7380). In 1968, a like ruling was made by the Federal Reserve Board [12 C.F.R. §250.141(h)].

Other activities carried on by national banks apart from their main banking offices that may be called into question include new business solicitation, loan closings, leasing, mortgage banking, data processing, investment advice, credit card services and various bank correspondent services.

By defining "branch" as a place where deposits are received, or checks paid or money lent, Section 36(f) provides a guide that is normally susceptible of being followed. The Court of Appeals decision that the three traditional banking functions are not the sole indicia of branch banking and that each case must be considered on its own facts, renders impossible a determination with any degree of certainty whether a given office constitutes a branch or a given activity constitutes branch banking.

Thus, the Court of Appeals' decision may have repercussions on off-premise national bank activities far beyond the single activity of a trust office with which this case is involved.

The potentially serious impact of the Court of Appeals' decision is not limited to national bank activities in the State of Missouri. At January 1, 1977, branch banking was (a) prohibited in 13 states (except for limited facilities in 12 such states), (b) permitted within limited geographic areas in 15 states, and (c) permitted in 22 states. Thus, on the surface, the special and important question of federal law presented by this case, is of immediate concern to more than half of the states. See "Compendium of Issues Relating to Branching by Financial Institutions" prepared by the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong. 2d Sess (October, 1976), pp. 51 and 75.

The substantial uncertainty that has been engendered by the Court of Appeals' decision regarding the legal status of a myriad of widespread activities of national banks conducted away from their main banking offices can only be resolved by an authoritative judicial determination of this Court. Such resolution is of crucial concern not only to the banking industry, but also to the consuming public.

CONCLUSION

For the reasons stated, it is respectfully requested that Mercantile's petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

Appendix A—Memorandum and Judgment, United States District Court, Eastern District of Missouri, Eastern Division

Appendix B—Opinion, United States District Court of Appeals, Eighth Circuit

Appendix C—Order, United States Court of Appeals, Eighth Circuit (on Petitions for Rehearing)

Appendix D—Order, United States Court of Appeals, Eighth Circuit (on Stay of Mandate)

Appendix E—Order, United States Court of Appeals, Eighth Circuit (on extension of Stay of Mandate)

Appendix F—Stipulation of Facts

APPENDIX A

In the United States District Court
Eastern District of Missouri
Eastern Division

St. Louis County National Bank, Plaintiff, Clayton Trust Company, and William R. Kostman, Director of the Division of Finance for the State of Missouri, Intervenor-Plaintiffs, vs. Mercantile Trust Company National Association, and James E. Smith, Comptroller of the Currency of the United States, Defendants.	No. 74-226 C (2)

MEMORANDUM

In this action tried to the Court, the facts have been stipulated and the matter has been submitted on the pleadings and exhibits thereto, the interrogatories of plaintiff to defendants and the answers to said interrogatories and the stipulation of facts with the exhibits attached thereto. The Court having fully considered all said matters and the briefs of the parties and being fully advised in the premises, makes and files the following findings of fact and conclusions of law thereon:

Findings of Fact

1. Plaintiff, St. Louis County National Bank, hereinafter called "County Bank," is a national banking association and has its place of business at 8000 Forsyth Boulevard in the City of Clayton, Missouri. It has no other office or place of business. County Bank is engaged in the banking business and was granted fiduciary powers by the Board of Governors of the Federal Reserve System on August 31, 1946. Pursuant to said grant of authority, County Bank has established a trust department which performs trust and fiduciary services at its place of business at Clayton, Missouri.

2. Defendant, Mercantile Trust Company National Association, hereinafter called "Mercantile," is a national banking association and has its principal place of business at 721 Locust Street in the City of St. Louis, Missouri. Mercantile is engaged in the banking business and was granted fiduciary powers by the Comptroller of the Currency of the United States on December 24, 1964. Pursuant to said grant of authority, Mercantile has established a trust department at 721 Locust Street in the City of St. Louis, Missouri, which performs trust and fiduciary services.

3. Intervenor-Plaintiff, Clayton Trust Company, hereinafter called "Clayton Trust," is a Missouri corporation incorporated on November 6, 1972 under the laws of Missouri relating to trust companies. It is located and conducts a trust business at its place of business at 222 South Central in the City of Clayton, Missouri. Clayton Trust opened for business with the public on November 1, 1973, and has continued to conduct its trust business at said location since that date. It has no other office or place of business. Clayton Trust is authorized to conduct only a trust business and under its Articles of Incorporation is prohibited from conducting a banking business.

4. Intervenor-Plaintiff, William R. Kostman, hereinafter called "Kostman," is the Director of the Division of Finance for the State of Missouri. Kostman is charged with the responsibility for the execution of the laws of the State of Missouri relating to state banks, state trust companies and the state banking business. Kostman is the successor in office to C. W. Culley who was Commissioner of Finance, Department of Business and Administration, State of Missouri, in February, 1970.

5. Defendant, James E. Smith, hereinafter called "Comptroller," is the chief administrator of the office of the Comptroller of the Currency of the United States, an agency of the United States Treasury Department. Comptroller as administrator of National Banks is charged with the responsibility of the execution and regulation of the National Bank Act, 12 U.S.C. §§1 et seq., and all other laws relating to National Banks. Comptroller is authorized and empowered to grant fiduciary powers to all National Banks and to issue regulations governing the exercise of such powers, all as set forth specifically in the Federal Reserve Act, 12 U.S.C. §92a, and the Code of Federal Regulations Title 12, Part 9. Comptroller is the successor in office to William B. Camp who was the Comptroller of the Currency of the United States in February, 1970.

6. County Bank, Mercantile, and Clayton Trust, in the exercise of their respective fiduciary powers granted by the Board of Governors of the Federal Reserve System and the Director of the Division of Finance for the State of Missouri offer to the public a full range of trust and fiduciary services including probate administration for deceased, incompetent or minor persons; personal trust administration created by inter vivos or testamentary instruments or life insurance agreements; administration of pension, profit-sharing or other employee benefit plans; and management of custodian and agency accounts.

7. On May 21, 1969, Mercantile informed the then Comptroller of the Currency by letter that it was making plans to

open a trust service office in Clayton, Missouri, located approximately 11 miles from its main banking office in the City of St. Louis. The Comptroller replied to Mercantile on June 12, 1969, stating that he had no objection to the proposed office in Clayton so long as Mercantile did not accept deposits, make loans or pay checks at the location, and that so long as the proposed office was not a branch office no certificate was needed for its operation.

8. On February 2, 1970, Mercantile opened its trust office in Clayton, Missouri. This office is approximately 3 blocks northwest of the trust office of Clayton Trust and 3 blocks east of the principal place of business of County Bank. No commercial banking services are performed by Mercantile at its trust office in Clayton, no checks are paid, no money lent, and no deposits are received. Mercantile's trust office in Clayton is not a separate legal entity but is an office subordinately operated by Mercantile from its main banking house in St. Louis and is a part of its central organization.

9. Mercantile uses its office in Clayton as a place to provide constant business contact with the public and to acquire new customers. At this office, Mercantile through its Trust Department employees, regularly carries on the following activities:

(a) Consults with customers and prospective customers and their attorneys, accountants and life underwriters concerning the trust services which Mercantile renders;

(b) Discusses the accounts of principals and beneficiaries of existing trusts and agencies;

(c) Reviews various proposed instruments which contemplate use of Mercantile's trust services, and discusses same with customers, prospective customers or their representatives;

(d) Provides convenient space for persons desiring to execute Wills, and sometimes acting as witnesses to Wills, which name Mercantile in a fiduciary capacity;

(e) Provides convenient space for persons desiring to execute Insurance Trusts, Living Trusts, Managing Agency Accounts and Custodian Accounts, which name Mercantile in a fiduciary capacity;

(f) Reviews existing Willis on file for present customers which wills are filed at Mercantile's principal place of business at 721 Locust Street, St. Louis, Missouri; and

(g) Researches estate and trust problems and discusses same with customers and their representatives.

10. On occasions, Mercantile receives estate and trust assets at the Clayton office. Customers and prospective customers use that office to sign documents and to deliver papers, documents and property to Mercantile and to receive papers, documents and property from Mercantile. On occasions, trust officers assigned to the Clayton office sign trust documents at that office in the name of and on behalf of Mercantile as a party to the trust instruments.

11. Although Mercantile receives estate and trust assets from the public at its Clayton office, it does not retain such assets at the Clayton premises but transfers them promptly to its main office in the City of St. Louis. No permanent records are maintained at its Clayton trust office; trust investment decisions, purchase and sale of securities, accounting services and safekeeping of assets for trust accounts are performed at Mercantile's Trust Department at its location at 721 Locust Street, St. Louis, Missouri.

12. All personnel of the Clayton office are full-time employees of the Trust Department of Mercantile. Their duties are to obtain new customers for the Trust Department and they perform substantially the same duties which similarly qualified

employees perform in the Trust Department at Mercantile's main banking house in St. Louis. No commercial banking personnel are connected with or are employed at the trust office.

13. The value to Mercantile of being able to continue to maintain its trust office in Clayton and to continue to conduct at that office the activities it now conducts there exceeds the sum of Ten Thousand Dollars ($10,000.00) exclusive of interest and costs.

14. The activities of Mercantile at the Clayton office with its present and prospective customers are in competition with the business activities of plaintiff, County Bank, and intervenor-plaintiff, Clayton Trust, which are located in Clayton, Missouri.

15. The operation by Mercantile at its trust office in Clayton constitutes a serious obstacle to plaintiffs, County Bank and Clayton Trust, in their respective efforts to obtain new customers for their trust business from the Clayton area and from adjacent areas. New trust business acquired by Mercantile through the activities of its personnel located at its trust office in Clayton deprives each of said plaintiffs of the opportunity to obtain such trust business for itself.

16. The maintenance by Mercantile of its branch trust office for the purposes and activities carried on by it at such office, gives to Mercantile or any other national bank engaging in similar activities a substantial competitive advantage over state banks and state trust companies in the conduct of banking and trust business.

17. Neither County Bank nor Clayton Trust can measure accurately the amount of its monetary damages, or its future damages, caused by the continuing existence of the Clayton trust office of Mercantile, and neither has any adequate remedy at law to prevent the damage resulting from such competition.

18. The matter in controversy exceeds the value of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.

Conclusions of Law

1. This Court has jurisdiction of the parties and of the subject matter of this action.

2. There is an existing controversy among the parties with respect to their rights, status and other legal relations as affected by federal and state statutes, which is appropriate for determination by a declaratory judgment of this Court.

3. The conditions upon which a national bank may establish and operate a branch are set forth in 12 U.S.C., § 36. To the extent here relevant the statute provides that with the approval of the Comptroller of the Currency, a national bank may establish and operate a branch only if state banks are affirmatively authorized by statutes of the state in question to establish and operate branches "and subject to the restrictions as to location imposed by the law of the State on State banks." The words "State banks" as used in this statute includes trust companies.

4. Section 362.105, R.S.Mo., expressly prohibits a bank or trust company from maintaining a branch bank or trust company *or* receiving deposits or cashing checks except in its own banking house or as provided in Section 362.107, R.S.Mo.

5. There is no statute in Missouri which affirmatively authorizes a state bank or trust company to establish and operate branches other than certain drive-in and walk-up facilities which may be established under the conditions prescribed in Section 362.107, R.S.Mo. The latter statute specifically provides that nothing therein shall be deemed to authorize the maintenance or operation of a branch bank or a branch trust company in contravention of the prohibition contained in Section 362.105, R.S. Mo. Admittedly, Mercantile's trust office is not a facility within the meaning of Section 362.107.

6. 12 U.S.C., § 92a, empowers the Comptroller to authorize a national bank, "when not in contravention of State or local

law," to act as trustee and "in any other fiduciary capacity in which State banks, trust companies or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located."

7. The purpose and intent of § 36 was to place national and state banks on a basis of competitive equality insofar as branching is concerned. *First National Bank v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966). However, the content of the "branch" is to be determined by federal law and not by state law definition of the term. *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969).

8. The purpose and intent of § 92a is to place national banks which have been granted fiduciary powers on a basis of competitive equality with state banks and trust companies which are permitted by state law to exercise such powers.

9. Section 36(f) contains the only federal statutory, definition of the term "branch." That section provides:

> "The term 'branch' as used in this section shall be held to *include* any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent."

10. The mere fact that deposits are not received or that checks are not paid or that money is not lent at Mercantile's trust office does not of itself preclude a finding that said trust office is a "branch." Obviously, the trust office is not a branch *bank* for the conduct of Mercantile's commercial banking activities. By expressly providing in the definition of the term "branch" that said term shall be held to *include* any branch office at which deposits are received, checks are paid, or money lent, Congress clearly negated an intent to *limit* the meaning

of the term to a place at which at least one of the three named banking functions is performed. *First National Bank v. Dickinson*, supra, involved only the issue of whether, within the "include" portion of the definition, a bank has "received" a deposit at the time a customer delivers the money to a mobile armored car or to a secured stationary deposit receptacle. Even so, the Supreme Court noted, 396 U.S., l.c. 135, that at the very least, the term "branch bank" *includes* any place for receiving deposits, but that *"it may include more."* *Dickinson* cautioned that the definition in §36(f) "must not be given a restrictive meaning which would frustrate the congressional intent," citing in footnote 8 the statement of Representative McFadden in which he described the definitional section of the Act as providing that:

> "Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or *transacting any business carried on at the main office*, is a branch."

Under the construction contended for by Mercantile and by the Comptroller, nothing would prevent Mercantile or any other national bank, from establishing as many trust offices as it chooses, with no limitation upon the scope of the trust activities carried on at the branches, so long as no deposits are received, checks paid or money lent, these being activities which are not normally performed by trust companies. We do not believe such was the intent of Congress.

11. The special permit which was granted to Mercantile under §92a to act in a fiduciary capacity authorizes it to so act only when not in contravention of Missouri law. In drafting §92a, Congress limited the words "in contravention of state or local law" only to the extent that they should not be construed to permit the enactment of any state or local law which would be applicable solely to national banks and thereby adversely affect the federal policy of competitive equality. Section 92a(b).

In all other respects Congress intended to allow the state law to govern. In light of the congressional intent clearly expressed in Section 92a to maintain competitive equality between state and national banks, we do not believe that the grant of fiduciary powers encompasses the right to exercise those powers at a branch office when to do so would be in contravention of state law as applied to state banks and trust companies. To give such a meaning to the statute would frustrate the congressional intent.

We agree with the following statement in *American Trust Co. Inc. v. South Carolina State Board of Bank Control*, 381 F.Supp. 313, 323 (D.C. S.C. 1974):

> "Congress has paramount authority over national banks. . . . It can exercise its authority by incorporating restrictions found in state law. In 1927, when the McFadden Act, 12 U.S.C. §36 (1970) authorized national banks to operate branches to the same extent that a state bank located in the same state could operate them, it intended to create 'competitive equality' between state and national banks located in the same state. First Nat'l Bank v. Walker Bank and Trust Co., 385 U.S. 252, 261, 87 S.Ct. 492, 17 L.Ed.2d 343 (1966). It is apparent that in enacting §92a, Congress intended to create the *same kind of 'competitive equality'* with regard to trust services."

12. In *St. Louis Union Trust Co. v. Pemberton*, 494 S.W. 2d 408 (Mo. App. 1973), it was held that a branch trust office at which a constant business contact with the public is maintained and which is established for the purpose of getting and maintaining trust business is within the Missouri prohibition of "branching."

13. Mercantile's trust office is a branch under federal law within the purview of §36(f). The establishment of such a

trust office is also in contravention of state law as construed in *St. Louis Union Trust Co. v. Pemberton*, supra, and therefore is not authorized by §92a or by the special permit issued to Mercantile.

14. Defendants have wholly failed to prove that either plaintiff or intervenor-plaintiffs are guilty of laches. There is no evidence of unreasonable delay in seeking relief or of prejudice to defendants.

15. Plaintiff and intervenor-plaintiffs are entitled to a declaratory judgment that Mercantile's Clayton trust office is illegal and in contravention of Missouri law and federal statutes and to a judgment enjoining Mercantile from the continued use of said trust office.

Dated this 18th day of June, 1976.

JOHN K. REGAN
United States District Judge

In the United States District Court
Eastern District of Missouri
Eastern Division

St. Louis County National Bank, Plaintiff,
Clayton Trust Company, and William R. Kostman, Director of the Division of Finance for the State of Missouri, Intervenor-Plaintiffs,

vs.

Mercantile Trust Company National Association, and James E. Smith, Comptroller of the Currency of the United States, Defendants.

No. 74-226 C (2).

JUDGMENT

The Court having this day filed its Memorandum herein,

Now, Therefore, in accordance therewith, It Is Hereby Ordered, Adjudged and Declared

1. That the branch trust office established and operated by defendant Mercantile Trust Company National Association in Clayton, Missouri, is a branch within the meaning of 12 United States Code, §36, and that the establishment and operation of said branch trust office is violative of said statute.

2. That the establishment and operation of said branch trust office is in contravention of the law of the State of Missouri within the meaning of 12 United States Code, §92a, and that

the special permit granted to defendant Mercantile Trust Company National Association by the Comptroller of the Currency authorizing it to act in a fiduciary capacity does not authorize the establishment and operation of said branch trust office.

3. That defendant Mercantile Trust Company National Association be and it is hereby enjoined and restrained from further operating said branch trust office.

4. That the costs herein be assessed against defendant Mercantile Trust Company National Association.

Dated this 18th day of June, 1976.

JOHN K. REGAN
United States District Judge

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 76-1603

No. 76-1709

St. Louis County National Bank, Clayton Trust Company, and William R. Kostman, Director of the Division of Finance of the State of Missouri,
Appellees,

v.

Mercantile Trust Company National Association and James E. Smith, Comptroller of the Currency of the United States,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: September 15, 1976

Filed: December 16, 1976

Before Markey, Chief Judge,* Stephenson and Henley, Circuit Judges.

Stephenson, Circuit Judge.

Mercantile Trust Company National Association (Mercantile) appeals from the district court's[1] judgment which enjoined Mercantile from any further operation of its trust office in Clayton, Missouri. The two issues raised on this appeal are: (1) whether Mercantile's trust office is a branch within the meaning of 12 U.S.C. § 36, and (2) whether Mercantile's trust office constitutes a violation of 12 U.S.C. § 92a. We affirm.

* The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

[1] The Honorable John K. Regan, United States District Judge for the Eastern District of Missouri.

Mercantile is a national banking association whose principal office is located in St. Louis, Missouri. Mercantile is engaged in the banking business and operates a trust department. In February of 1970 Mercantile opened a trust office in Clayton, Missouri, a suburb of St. Louis. Prior to opening the Clayton office, Mercantile received notice from the Comptroller of Currency of the United States approving the establishment of the trust office as long as deposits were not accepted, loans made, or checks paid. According to the Comptroller, if deposits were accepted, loans made, or checks paid, then the trust office would fall within the definition of a branch as set forth in 12 U.S.C. § 36(f) and a certificate of approval from the Comptroller's office would be needed.

On the date that Mercantile opened its trust office Mercantile issued a press release stating that the trust office would provide added convenience for existing as well as future customers. Five full-time employees of Mercantile staffed the Clayton office. From the spring of 1970 until March of 1973 the overall administration of approximately 500 living and testamentary trusts, managing agency and safekeeping accounts were handled by a trust administrative officer at the trust office. During this period no checks were paid, no money was lent, and no deposits were received at the Clayton trust office. The Clayton office was not a separate corporation but rather an office operated by Mercantile as part of its organization.

This action was commenced by St. Louis County National Bank for a declaratory judgment that Mercantile's Clayton trust office was illegal. An injunction was also sought against Mer-

cantile's continued use of the Clayton office. James E. Smith, the then-Comptroller of the Currency of the United States, was joined with Mercantile as a defendant. Clayton Trust Company and William R. Kostman, Director of the Division of Finance for the state of Missouri, were permitted to intervene as plaintiffs.

On June 18, 1976, the district court enjoined and restrained Mercantile from further operating its branch trust office. On August 2, 1976, our court granted Mercantile's application to suspend injunction pending appeal until further order of the court. After a hearing on August 5, 1976, our court ordered that the injunction be stayed until further order of the court.

Appellant Mercantile's first contention is that its Clayton trust office does not constitute a branch as defined by 12 U.S.C. § 36(f). The question concerning whether the trust office is a branch is important since a branch may be established only when, where, and how state law would authorize a state bank to establish and operate such a branch. 12 U.S.C. § 36 (c);[2] *First Nat'l Bank v. Dickinson*, 396 U.S. 122, 130 (1969); *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966). In this case it is clear that a state chartered bank would be unable to operate the same type of facility as Mercantile's Clayton trust office. *See St. Louis Union Trust Co. v. Pemberton*, 494 S.W.2d 408 (Mo. App. 1973). Therefore,

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[2] 12 U.S.C. § 36(c) provides in relevant part:

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

if the Clayton office is a branch under 12 U.S.C. § 36(f), it would be illegal under 12 U.S.C. § 36(c).

Section 36(f) defines a branch as follows:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State * * * at which deposits are received, or checks paid, or money lent.

Appellant Mercantile's argument simply stated is that since no deposits are received, or checks paid, or money lent at the Clayton trust office, it is not a branch. Recent cases interpreting section 36(f) have cautioned, however, about giving the definition of branch a too restrictive meaning.

Chief Justice Burger has observed for the Supreme Court that:

> [W]hile Congress has absolute authority over national banks, the federal statute has incorporated by reference the limitations which state law places on branch banking activities by state banks. Congress has deliberately settled upon a policy intended to foster "competitive equality." * * * State law has been utilized by Congress to provide certain guidelines to implement its legislative policy.
>
> * * *
>
> [The] Act reflects the congressional concern that neither system have advantages over the other in the use of branch banking.
>
> * * *
>
> The mechanism of referring to state law is simply one designed to implement that congressional intent and build into the federal statute a self-executing provision to accomodate to changes in state regulation.
>
> * * *

In short, the definition of "branch" in § 36(f) must not be given a restrictive meaning which would frustrate the congressional intent this Court found to be plain in *Walker Bank, supra.*

* * *

Because the purpose of the statute is to maintain competitive equality, it is relevant in construing "branch" to consider, not merely the contractual rights and liabilities created by the transaction, but all those aspects of the transaction that might give the bank an advantage in its competition for customers.

First Nat'l Bank v. Dickinson, supra, 396 U.S. at 131, 133, 134, 136-37 (citations and footnote omitted).

In this circuit we have likewise recognized that "The preservation of competitive equality is the pervasive underlying principle of the McFadden Act." *Nebraskans for Independent Banking, Inc. v. Omaha Nat'l Bank,* 530 F.2d 755, 759 (8th Cir.) (citation omitted), *vacated and remanded for reconsideration in light of subsequent state legislation,* 96 S.Ct. 2616 (1976). Further, we have stated "It is settled that the McFadden Act, which, as amended, is the controlling statute here, was "intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned." *Driscoll v. Northwestern Nat'l Bank,* 484 F.2d 173, 175 (8th Cir. 1973) (citations omitted).

Similarly, the Tenth Circuit has stated:

> [Section 36(f)] declares that the term "branch" shall *include* any branch place of business where deposits are received or checks paid, or money lent. In this regard the Supreme Court in *Dickinson* commented as follows:
>
> > Although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch"; by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more.
>
> In line with the foregoing, then, accepting deposits, or paying checks, or lending money are not the only indicia of branch banking. The typical bank of the present time provides many other services.

State of Colorado ex rel. State Banking Board v. First Nat'l Bank of Fort Collins, 540 F.2d 497, 499 (10th Cir. 1976).

Likewise, the District of Columbia Circuit has recently observed:

> After the Act's passage, Representative McFadden placed in the Congressional Record a section-by-section analysis of the statute. In this analysis he described the scope of section 36(f)'s definition as follows:
>
> > [Section 36(f)] defines the term "branch." *Any place outside of or away from the main office* where the bank carries on its business of receiving deposits, paying checks, lending money, or *transacting any business carried on at the main office,* is a branch if it is legally established under the provisions of this act.
>
> * * *
>
> Clearly, Congress intended to include within its definition not only the typical brick-and-mortar branch bank, but also lesser bank agencies which provide only some of the services available at a traditional branch, *i.e.*, agencies which accept deposits, cash checks, lend money, or transact any business generally carried on at the main office.

Independent Bankers Ass'n of America v. Smith, 534 F.2d 921, 931-32 (D.C. Cir. 1976) (footnote omitted).

In light of the legislative history of section 36(f) and recent case interpretation of that section, we conclude that the three routine banking functions delineated in section 36(f) are not the only indicia of branch banking. In our view each case must be considered on its own facts to determine if a branch exists. *North Davis Bank v. First Nat'l Bank*, 457 F.2d 820, 824 (10th Cir. 1972).

Turning to the record before us we note that Mercantile's main office in St. Louis conducts a substantial amount of trust business.[3] The activities performed by Mercantile at its Clayton office are summarized as follows: (1) consults with customers and prospective customers about the trust services offered by Mercantile; (2) discusses accounts with principals and beneficiaries of existing trusts; (3) reviews with customers and their representatives proposed trust instruments; (4) provides a place for persons to execute wills and trusts which name Mercantile as fiduciary; (5) reviews wills on file for present customers; and (6) researches estate and trust problems and discusses such problems with customers and their representatives. It is apparent that these enumerated activities are also carried on routinely at Mercantile's main office. This alone would clearly bring Mercantile's Clayton office within the branch definition as declared by Representative McFadden's own analysis of section 36(f) at the time of its adoption. *See State of Ill. ex rel. Lignoul v. Continental Ill. Nat'l Bank and Trust Co.*, 536 F.2d 176, 178-79 (7th Cir. 1976). Furthermore, the permanent staff's duties are to obtain new customers for the trust department of Mercantile. The services offered increase the convenience to Mercantile's customers. In light of these factors, we hold that the establishment of such a permanent place of business as undertaken by Mercantile is a branch as contemplated by section 36(f). It should be emphasized that this holding is based on our interpretation of the language of section 36(f) as explained by its own author's analysis, its construction given by other courts, and the purpose for its Congressional enactment. We do not rely on the state of Missouri's definition of branch in determining the content of branch in section 36(f).

[3] Mercantile held nearly two billion dollars of fiduciary assets as of December 31, 1973.

Our holding is reinforced by 12 U.S.C. § 92a. Section 92a (a) reads as follows:

> (a) The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

Section 92a(b) reads as follows:

> (b) Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this section.

The policy of competitive equality was incorporated into section 92a. *Blaney v. Florida Nat'l Bank*, 357 F.2d 27, 30 (5th Cir. 1966); *American Trust Co. v. South Carolina State Board of Bank Control*, 381 F.Supp. 313, 323 (D.S.C. 1974); *New Hampshire Bankers Ass'n v. Nelson*, 336 F.Supp. 1330, 1334

(D.N.H.), *aff'd*, 460 F.2d 307 (1st Cir.), *cert. denied*, 409 U.S. 1001 (1972). It is equally clear that a state bank in Missouri would be prohibited from operating more than one place of business for the exercise of fiduciary powers. Mo. Ann. Stat. §§ 362.105 subd. 1(1) and 362.107 subd. 2(5) (Vernon); *St. Louis Union Trust Co. v. Pemberton, supra*. Therefore, to allow Mercantile to accomplish what a state bank could not would frustrate the purpose of section 92a.

The First Circuit, in construing section 92a, stated:

> Implicit in the state's power to proscribe national banks from acting as executors, we think, is the power to permit them to act as executors while precluding them, in a nondiscriminatory way, from advertising that fact.

New Hampshire Bankers Ass'n v. Nelson, supra, 460 F.2d at 308. Similarly, we conclude that the state's power to nondiscriminately limit the location where fiduciary powers may be exercised is implicit in the state's power to proscribe national banks from acting as executors. It follows that Mercantile's exercise of fiduciary powers at its Clayton trust office is in contravention of state law within the meaning of section 92a.

Affirmed.

Henley, Circuit Judge, Dissenting.

The majority holds that in view of Missouri's restrictions on branch operations by Missouri banks and trust companies, including "pure" trust companies, Mercantile Trust Company, a national bank, is prohibited by virtue of the McFadden Act of 1927, 12 U.S.C. § 36, and the Act of September 28, 1962, P.L. 87-722, 76 Stat. 668, 12 U.S.C., Cum. Supp. § 92a, from operating a trust office in Clayton, Missouri, which office is fully described in the record and in the opinion of the majority. I respectfully disagree.

My dissent is based in part on the fact that it seems to me that in determining that the trust office in question is a "branch" within the meaning of 12 U.S.C. § 36(f) the majority is following the line of reasoning that two of my colleagues and I were not able to accept in *Nebraskans for Independent Banking v. Omaha Nat'l Bank*, 530 F.2d 755 (8th Cir.), *remanded* for further consideration in the light of supervening Nebraska legislation, — U.S. —, 96 S.Ct. 2616 (1976).[1] I refer specifically to the concurring opinion of Judge Lay, 530 F.2d at 764, and to the dissenting opinion of Judge Webster in which I joined, 530 F.2d at 764-67.

As the majority concedes, the question of whether a given financial facility is a "branch" within the meaning of § 36(f) is a federal question and is not controlled by state ideas of what constitutes a branch bank or other financial institution. We recognized that principle in *State of Missouri ex rel. Kostman v. First Nat'l Bank in St. Louis*, 538 F.2d 219 (8th Cir. 1976), wherein we held that so-called customer-bank, communications terminals operated off premises by a national bank constituted "branches" within the meaning of § 36(f) since they were capable at least of accepting deposits and causing them to be credited to the accounts of the depositors.

Conceding arguendo that it is possible for a facility maintained by a national bank to be a branch even though it does not receive deposits, cash checks, or make loans, I do not think that it can be said that a facility is a branch within the meaning of § 36(f) merely because it may perform some function or furnish some service, other than accepting deposits, cashing checks and making loans, which banks customarily provide.

When the McFadden Act was passed in 1927, it was well known to Congress that the operation of trust departments and

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[1] Following receipt of the mandate of the Supreme Court, this court remanded the case for further consideration by the district court, 539 F.2d 673 (8th Cir. 1976).

the furnishing of trust services was not an insignificant part of the business of banks, and I feel that if Congress had intended to include in its definition of a "branch" a trust office such as the one involved in this case, it would have said so just as it specifically mentioned the accepting of deposits, the cashing of checks, and the lending of money.

While what is now § 92a authorizes national banks to offer fiduciary services to the same extent that they may be offered by state banks or trust companies, § 92a says nothing about where such services may be offered by national banks, nor does it limit the number of places at which such services may be offered.

It should be kept in mind that §§ 36 and 92a were not passed by Congress for the purpose of restricting the operations of national banks. Rather, they were passed for the purpose of enabling national banks to compete with state banks on at least a plane of equality. For example, the McFadden Act itself was obviously the aftermath of the holding of the Supreme Court in *First Nat'l Bank in St. Louis v. State of Missouri*, 263 U.S. 640 (1924), that as the law then stood national banks could not operate branches, a situation which placed them at a competitive disadvantage in relation to state banks in states that permitted branching.

In the last analysis, the question of whether a national bank can lawfully perform a given function at a given place is a question of federal law, although in this context, as in others, state law may supply the governing federal law or may be considered as the source of federal law. *See First Nat'l Bank in St. Louis v. State of Missouri, supra*, 263 U.S. at 656, and *McClellan v. Chipman*, 164 U.S. 347, 357 (1896).

But, unless Congress has so prescribed, a national bank is not prohibited from engaging in a particular activity at a particular place simply because a state bank or other financial

institution cannot under state law engage in the same activity at the same place or in the same circumstances.

The Missouri statutes[2] dealing with banks and trust companies do not purport to regulate or restrict the activities of national banks as such. Nor could Missouri constitutionally forbid a national bank to do what it is permitted to do by governing federal law. If it happens that a national bank can do something that a state bank cannot do, it is open to the state to broaden the authority of its own institutions to match that of the federal ones.[3]

In sum, I agree with Mercantile and with the Comptroller that Mercantile's trust office in Clayton is not a branch, and that its continued operation is not prohibited by the McFadden Act or by § 92a.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

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[2] V.A.M.S. § 362.105(1) provides that no bank or trust company in Missouri shall maintain a branch bank or trust company or receive deposits or pay checks except in its own banking house otherwise than is provided in § 362.107. The section last mentioned permits Missouri banks to operate certain drive-in facilities within the cities in which the banks are domiciled. Section 362.107 is not involved in this case.

[3] Indeed, while the *Omaha Nat'l Bank* case that has been mentioned was pending, the Nebraska legislature adopted a bill that may permit Nebraska state banks to do what the Omaha National Bank was doing. It was that legislation that caused the Supreme Court to remand the case for further consideration in the light of the enactment.

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

76-1603 September Term, 1976

St. Louis County National Bank, etc., et al.,
Appellees,
v.
Mercantile Trust Company National Association, etc., et al.,
Appellants.

76-1709
St. Louis County National Bank, etc., et al.,
Appellees,
v.
James E. Smith, Comptroller of the Currency of the United States,
Appellant.

Appeals from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by Mercantile Trust Company National Association, appellant in cause No. 76-1603 and being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

Judges Bright, Webster and Henley voted to grant the petition filed by Mercantile Trust Company National Association.

The Court having considered petition for rehearing en banc filed by the Comptroller of the Currency, appellant in cases numbered 76-1603 and 76-1709 and being fully advised in the premises it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

The Comptroller's petition for rehearing en banc is denied on the basis of an evenly divided Court. Judges Lay, Bright, Webster and Henley voted to grant the petition.

January 31, 1977

APPENDIX D

United States Court of Appeals
For the Eighth Circuit

Appeals from the United States District Court
for the Eastern District of Missouri

No. 76-1603 September Term, 1976

St. Louis County National Bank, a national banking association and Clayton Trust Company and William R. Kostman, Director of the Division of Finance of the State of Missouri,
Appellees,

v

Mercantile Trust Company National Association, a national banking association and James E. Smith, Comptroller of the Currency of the United States,
Appellants.

No. 76-1709

St. Louis County National Bank, a national banking association; Clayton Trust Company and William R. Kostman, Director of the Division of Finance of the State of Missouri,
Appellees,

v.

James E. Smith, Comptroller of the Currency of the United States, Appellant.

On motion of Mercantile Trust Company National Association, it is now here ordered that the issuance of the mandate in these causes be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed

with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

February 11, 1977.

APPENDIX E

United States Court of Appeals
For the Eighth Circuit

September Term, 1976

No. 76-1603

St. Louis County National Bank, a national banking association and Clayton Trust Company and William R. Kostman, Director of the Division of Finance of the State of Missouri,

Appellees,

vs.

Mercantile Trust Company National Association, a national banking association and James E. Smith, Comptroller of the Currency of the United States,

Appellants.

No. 76-1709

St. Louis County National Bank, a national banking association; Clayton Trust Company and William R. Kostman, Director of the Division of Finance of the State of Missouri,

Appellees,

vs.

Mercantile Trust Company National Association, a national banking association

James E. Smith, Comptroller of the Currency of the United States,

Appellant.

Appeals from the United States District Court for the

Eastern District of Missouri

On motion of Mercantile Trust Company National Association, it is now here ordered that the issuance of the mandate in these causes be, and the same is hereby, stayed for a period of thirty days from March 13, 1977, or up to and including April 12, 1977. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

March 9, 1977

APPENDIX F

In the United States District Court
Eastern District of Missouri
Eastern Division

St. Louis County National Bank, a National Banking Association,
Plaintiff,

Clayton Trust Company
a Corporation,

and

William R. Kostman, Director of the Division of Finance for the State of Missouri,
Intervener-Plaintiffs,

v.

Mercantile Trust Company National Association, a National Banking Association,

and

James E. Smith, Comptroller of the Currency of the United States,
Defendants.

No. 74-226C (2).

STIPULATION OF FACTS

Come now the parties hereto by their respective attorneys and stipulate that the following facts may be taken as proved without the necessity of offering any further evidence; all parties, however, reserving all objections to the relevancy or materiality of

any of the matters recited herein and further reserving the right to offer such other and further competent, relevant and admissible evidence as they may desire at the hearing of this cause:

1. Plaintiff, St. Louis County National Bank, hereinafter called "County Bank", is a national banking association, originally incorporated under the banking laws of the State of Missouri on January 24, 1890 and thereafter chartered as a national bank on November 1, 1945, and has its principal place of business at 8000 Forsyth Boulevard in the City of Clayton, Missouri. County Bank is engaged in the banking business and was granted fiduciary powers by the Board of Governors of the Federal Reserve System on August 31, 1946. Pursuant to said grant of authority, County Bank has established a trust department which performs trust and fiduciary services at its principal place of business in the City of Clayton, Missouri.

2. Defendant, Mercantile Trust Company National Association, hereinafter called "Mercantile", is a national banking association and has its principal place of business at 721 Locust Street in the City of St. Louis, Missouri. Mercantile is engaged in the banking business and was granted fiduciary powers by the Comptroller of the Currency of the United States on December 24, 1964. Pursuant to said grant of authority, Mercantile has established a trust department at 721 Locust Street in the City of St. Louis, Missouri which performs trust and fiduciary services. Prior to becoming a national banking association Mercantile was a Missouri trust company carrying on both a banking and a trust business at its place of business at 721 Locust Street in the City of St. Louis.

3. Intervener-plaintiff, Clayton Trust Company, hereinafter called "Clayton Trust", is a Missouri corporation incorporated on November 6, 1972 under the laws of Missouri relating to trust companies. It is located and conducts a trust business at its place of business at 222 South Central in the City of Clayton,

St. Louis County, Missouri. Clayton Trust opened for business with the public on November 1, 1973 and has continued to conduct its trust business at said location since that date. Clayton Trust is authorized to conduct only a trust business and, under its Articles of Incorporation, is prohibited from conducting a banking business.

4. Intervenor-plaintiff, William R. Kostman, is the Director of the Division of Finance for the State of Missouri, hereinafter called "Kostman." Kostman is charged with the responsibility for the execution of the laws of the State of Missouri relating to state banks, state trust companies, and the state banking business. Kostman has the power to institute and defend suits in the courts of Missouri and the United States, and such powers, duties and responsibilities being more specifically set forth in Chapter 361, R.S. Mo. 1969. It is the public duty of Kostman to execute and enforce the banking policies and laws of the State of Missouri. Kostman is the successor in office to C. W. Culley who was Commissioner of Finance, Department of Business and Administration, State of Missouri, in February, 1970, at the time defendant Mercantile established its trust office in Clayton, Missouri and commenced its trust and fiduciary activities at that location.

5. Defendant James E. Smith, hereinafter called "Comptroller", is the chief administrator of the Office of the Comptroller of the Currency of the United States, an agency of the United States Treasury Department. Comptroller, as Administrator of National Banks, is charged with the responsibility for the execution and regulation of the National Bank Act, 12 U.S.C., §§ 1, *et seq.*, and all other laws relating to national banks. Comptroller is authorized and empowered to grant fiduciary powers to all national banks and to issue regulations governing the exercise of such powers. The exercise of fiduciary powers by all national banks, and all duties and responsibilities of national banks as fiduciaries are specifically set forth in Public

Law 87-722, 76 Stat. 668, 12 U.S.C. § 92a, and in rules and regulations governing the exercise of fiduciary powers by national banks published in the Code of Federal Regulations, Title 12, Part 9, and in the "Comptroller's Manual for Representatives in Trust". Comptroller is the successor in office to William B. Camp who was the Comptroller of the Currency of the United States in February, 1970, at the time defendant Mercantile established its trust office in Clayton, Missouri.

6. Plaintiff brought this action under the laws of the United States and has alleged that the Court has jurisdiction hereof pursuant to 28 U.S.C. §§ 2201-2202, and 28 U.S.C. § 1331(a), and that the matter in controversy exceeds the sum of Ten Thousand Dollars, exclusive of interest and costs.

7. The value to Mercantile of being able to continue to maintain its trust office and to continue to conduct at this office the activities it now conducts at that location exceeds the amount of Ten Thousand Dollars, exclusive of interest and costs.

8. Mercantile is the largest bank in Missouri, with its main banking house located at 721 Locust Street in the City of St. Louis, Missouri. Mercantile is owned by Mercantile Bancorporation, Inc. Mercantile Bancorporation, Inc. is one of approximately twenty-four multi-bank holding companies in Missouri. Mercantile Bancorporation, Inc. owns seventeen other banks in Missouri, and has acquisition agreements now pending for four additional banks. Plaintiff County Bank is the largest bank in St. Louis County, Missouri and is the seventh largest bank in the State of Missouri. County Bank is owned by County National Bancorporation, a multi-bank holding company, which owns two other banks in Missouri.

9. The five largest holders of fiduciary assets in St. Louis and St. Louis County held fiduciary assets at December 31, 1973, in the following amounts:

(1) St. Louis Union Trust Company	$3,732,368,146
(2) Mercantile	1,920,695,157
(3) The Boatmen's National Bank of St. Louis	1,356,770,559
(4) County Bank	134,410,055
(5) Tower Grove Bank & Trust	76,283,076

At September 30, 1974, Clayton Trust held fiduciary assets of approximately Two Million Dollars.

10. Pursuant to authority granted by the Comptroller effective December 24, 1964 attached hereto and incorporated by reference as Stipulation Exhibit 1, Mercantile was granted "the right to act as Trustee, Executor Administrator, Registrar of stocks and bonds, Guardian of estates, Assignee, Receiver, Committee of estate of lunatics, or in any other fiduciary capacity in which state banks, trust companies or other corporations which come into competition with national banks, are permitted to act under the laws of the State of Missouri. The exercise of such rights is subject to regulation by the Comptroller."

11. On February 2, 1970, Mercantile opened a trust office in the Pierre Laclede Center, 7733 Forsyth Boulevard in Clayton, Missouri to perform the activities set forth herein. Said location is approximately three blocks east of St. Louis County National Bank, which is located at the intersection of Forsyth Boulevard and Meramec Avenue in Clayton, Missouri. Said location is approximately three blocks northeast of Clayton Trust, which is located at 222 South Central Avenue, in Clayton, Missouri.

12. Prior to opening the trust office, Mercantile communicated with the Comptroller of the Currency by letter dated May 21, 1969 from Mr. Donald E. Lasater, then President and now

Chairman of the Board and Chief Executive Officer of Mercantile. A copy of said letter is attached hereto and incorporated herein by reference as Stipulation Exhibit 2. The Comptroller of the Currency responded to said letter from Mercantile by letter dated June 13, 1969, a copy of which is attached hereto and incorporated herein by reference as Stipulation Exhibit 3.

13. Mercantile occupied its trust office at 7733 Forsyth Boulevard as tenant pursuant to a written lease dated December 3, 1969 with Nooney Company as landlord. Attached hereto as Stipulation Exhibit 4, and incorporated herein by reference, is a copy of said lease for the period January 1, 1970 to December 31, 1974 covering 2,096 square feet at an annual base rental of $13,104.00 per year, payable at monthly rental of $1,092.00. Mercantile has used this office from February 2, 1970 to September 21, 1974 to conduct some or all of the activities described herein.

14. Stipulation Exhibit 5, attached hereto and incorporated by reference, is a copy of a lease dated July 31, 1974 by and between Mercantile, as tenant, and Nooney Company, as landlord, for premises located at 7701 Forsyth Boulevard, Clayton, Missouri. Said lease is for the period October 1, 1974 to September 30, 1979 covering 2,958 square feet at an annual base rental of $20,712.00 per year, payable at monthly rental of $1,726.00. Mercantile entered into said lease agreement, and commenced occupancy of said premises since September 21, 1974 for use as its trust office to conduct the activities described herein.

15. As the result of an initiative petition, a proposed law was submitted to the voters of the State of Missouri for approval or rejection at the general election held on November 4, 1958. A copy of that proposed law is attached as Stipulation Exhibit 6. The vote cast in that election was 287,931 for adoption of the proposal and 677,539 against adoption.

16. Attached hereto and incorporated herein and collectively labeled Stipulation Exhibit 7 are (a) press release dated February 2, 1970 from Orville R. Goerger, Vice President and Director of Mercantile Public Relations and Advertising; (b) copy of insert referring to Mercantile's trust office in Clayton, Missouri which accompanied checking account statements mailed to Mercantile depositors in January, 1973; and (c) internal memo to staff of Mercantile dated February 2, 1970 announcing the opening of the trust office.

17. No banking services are performed at Mercantile's trust office in Clayton. No checks are paid, no money lent, no deposits received at the trust office. No commercial banking personnel are connected with or employed at the trust office. Such banking services are performed by Mercantile at its principal place of business located at 721 Locust Street in the City of St. Louis, Missouri.

18. Mercantile performs the following activities at its trust office in Clayton, Missouri, to-wit:

(a) Consults with customers and prospective customers and their attorneys, accountants and life underwriters concerning the trust services which Mercantile renders;

(b) Discusses the accounts of principals and beneficiaries of existing trusts and agencies;

(c) Reviews various proposed instruments which contemplate use of Mercantile's trust services, and discusses same with customers, prospective customers or their representatives;

(d) Provides convenient space for persons desiring to execute Wills, and sometimes acting as witnesses to Wills, which name Mercantile in a fiduciary capacity;

(e) Provides convenient space for persons desiring to execute Insurance Trusts, Living Trusts, Managing Agency Accounts and Custodian Accounts, which name Mercantile in a fiduciary capacity;

(f) Reviews existing Wills on file for present customers which Wills are filed at Mercantile's principal place of business at 721 Locust Street, St. Louis, Missouri; and

(g) Researches estate and trust problems and discusses same with customers and their representatives.

All of the foregoing services continue to be performed by Mercantile at its new location at 7701 Forsyth Boulevard.

19. When Mercantile opened its trust office in Clayton, Missouri February 2, 1970, William L. Hoemann, an Assistant Trust Officer, was the sole trust officer in charge with one secretary. Shortly thereafter in the spring of 1970 Edgar Taylor, Trust Officer of Mercantile, joined the staff at the trust office. Thereafter, and from time to time, various changes in personnel occurred until, at the date of this Stipulation, there are five persons employed by Mercantile at the trust office, to-wit:

Elmer W. Wiltsch, Vice President
Cort L. Bick, Assistant Trust Officer
Charles W. Lynch, Assistant Trust Officer
C. E. McCaskill, Trust Representative
Mrs. Alice Grimm, Secretary

All of the said persons are full-time employees in the Trust Department of Mercantile; their duties are to obtain new customers for the Trust Department of Mercantile. The employees in the trust office do substantially the same work which they, or other similarly classified employees, do in the Trust Department at 721 Locust Street, St. Louis, Missouri.

20. The following functions were performed and the following services rendered by Mercantile at its trust office in Clayton, Missouri:

(a) During the period from the spring of 1970 to the spring of 1972, Edgar Taylor, Trust Officer, was assigned to the trust office. During this period, Mr. Taylor, in his capacity as administrative officer for certain trusts, was responsible for the overall administration of approximately 500 living and testamentary trusts, managing agency and safekeeping accounts. In this connection, the administrative officer kept certain documents at the trust office relating to each account, consisting of all or some of the following: a document summarizing the trust instrument and sometimes including vital statistics of the trust participants, a copy of the trust instrument, a copy of the latest investment analysis review and correspondence. Information regarding a particular trust account would be obtained by the administrative officer in the trust office, by telephone to the Trust Department at 721 Locust Street, or at the request of the administrative officer, records were delivered to the trust office from the Trust Department and used at the trust office and were then returned to the Trust Department. Contacts were made by Mr. Taylor with the Grantors of said Trusts, or the beneficiaries thereof, from the trust office, including correspondence, consultation and advice concerning said administration.

Upon the retirement of Edgar Taylor, Gerald Wedemier was assigned by Mercantile to its trust office in January, 1972, and Mr. Wedemier performed the services of the trust administrative officer for the various accounts which were assigned to and were the responsibility of the said Edgar Taylor. Sometime in approximately March, 1973 all accounts at the trust office, together with the documents referred to above, were transferred by Mercantile to its Trust Department located at 721 Locust Street, St. Louis, Missouri. At the date of filing this Stipulation, no administrative officer is employed at the trust office and no accounts are being administered from or are located at the trust office.

(b) On infrequent occasions, the employees of Mercantile at its trust office received assets from customers which were part of their trust estates and would receipt therefor. On infrequent occasions, a grantor of a new trust would deliver a divident check to the trust office to be added to his trust. Such dividend check would be payable to the grantor and received by him because of the delay in transferring title to the shares of stock from the grantor to the trust. Said assets and dividend checks were delivered by messenger on the day of receipt at the trust office to Mercantile's Trust Department located in the City of St. Louis, Missouri for the purpose of accounting and safekeeping. On infrequent occasions, miscellaneous papers and documents were delivered by customers to the trust office for forwarding to Mercantile's Trust Department and were delivered by Mercantile's Trust Department to the trust office for transmittal to customers.

(c) As the trust administrative officer, Edgar Taylor and Gerald Wedemier, would, from time to time, notify employees of Mercantile's Trust Department located in the City of St. Louis that checks for the disbursement of trust funds should be written and delivered to the Clayton trust office. On these occasions, said trust administrative officers would deliver said checks, or otherwise make distribution thereof, from the Clayton trust office to the beneficiaries of the various trust accounts under their administration.

(d) The trust office is operated by Mercantile and consists of one officer of Mercantile as department head, two assistant trust officers and one trust representative. With information furnished by employees of Mercantile at the trust office and other employees in the Trust Department, an employee of Mer-

cantile at its Trust Department in the City of St. Louis, Missouri, prepares weekly reports of new trust business acquired by the Trust Department, including the trust office, and indicates on said reports the name of the originating officer, the name and address of the customer, the type of fiduciary instrument involved, the name of the customer's attorney and the estimated value of the trust assets comprising the new business. Said reports are delivered to the officer in charge of the Trust New Business Department of Mercantile and to certain other officers in the Trust Department located in the City of St. Louis, Missouri. The Trust New Business Department of Mercantile located in the City of St. Louis, Missouri, consists of one officer as head of the department, two trust officers, a trust representative, a trust marketing officer and two instrument review officers.

21. Mercantile maintains no permanent records at its trust office; trust investment decisions, purchase and sale of securities, accounting services and safekeeping of assets for trust accounts are performed at Mercantile's Trust Department at its location at 721 Locust Street, St. Louis, Missouri. The receipt and delivery of securities and the disbursement of trust funds are handled at 721 Locust Street except for the occasions described in paragraph 20(b) and (c) when these activities occur at the trust office. Customers of Mercantile execute and/or deliver wills, trust instruments and other fiduciary documents in the trust office located in Clayton, Missouri. By appointment, employees of Mercantile's Trust Department at 721 Locust Street use the trust office located in Clayton, Missouri for consultation with its current customers, their attorneys or representatives in the conduct of its fiduciary business including trust, probate estates, investments and accounts being administered, or to be administered, by Mercantile, and in the evaluation, discussion and preparation of estate plans and other fiduciary services which Mercantile offers to the public.

22. On occasions, trust officers assigned to the trust office signed trust documents at the office in the name of and on behalf of Mercantile as a party to the trust instruments. No trust document in which Mercantile is named as a fiduciary is signed by a trust officer at the trust office unless it is first reviewed and approved by review counsel of Mercantile at its Trust Department in the City of St. Louis, Missouri, except on infrequent occasions review counsel, when time is a factor, goes to the trust office and reviews a trust document there. Following the signing of a trust document by an officer of Mercantile, Mercantile requires that the trust document be accepted by four Mercantile officers, including trust officers or assistant trust officers, who affix their signatures to a form called an acceptance sheet. The acceptance sheet may be and is sometimes partially signed at the Clayton trust office by any persons eligible to do so and is sent to 721 Locust Street for additional signatures as required. The acceptance sheet could be fully signed at the Clayton trust office if the required number of signatures could be obtained there.

23. The Personal Trust Department of Mercantile is the largest division of its Trust Department and has more employees and administers a greater amount of assets than any other division within the Trust Department.

* * * * * * *

24. There is attached to the premises at 7733 Forsyth Boulevard in Clayton facing Forsyth Boulevard, a sign notifying the public of the existence of the office reading "Mercantile Trust Company Trust Office". The entrance to the trust office is from the lobby of the Pierre Laclede Center at 7733 Forsyth Boulevard and on the glass door of the entrance is an additional sign indicating Mercantile's trust office reading "Mercantile Trust Company Trust Office".

Stipulation Exhibit 8 attached hereto and incorporated by reference consists of four photographs of the exterior of the office at 7733 Forsyth Boulevard and the announcement of the new office at 7701 Forsyth.

25. In the trust office Mercantile maintains a supply of promotional material describing its personal trust services and these materials are available to members of the public coming into the office. Copies of said publications are attached hereto as Stipulation Exhibit 9. A schedule of Mercantile's fees for performing trust services is given to members of the public upon request. Specimen forms of trust instruments are available to lawyers on request.

26. Stipulation Exhibit 10 attached hereto and incorporated by reference is a copy of the invitation which was used by Mercantile for six (6) open-house cocktail parties which have been held at Mercantile's trust office in Clayton, Missouri for lawyers, principally those practicing in Clayton, Missouri. The open-house cocktail parties occurred in April, 1972, April, 1973 and April, 1974.

27. Plaintiff County Bank and intervener-plaintiff Clayton Trust each offer to the public a full range of trust and fiduciary services including, probate administration for deceased, incompetent or minor persons; personal trust administration whether created by inter vivos or testamentary instruments or life insurance agreements; administration of pension profit sharing and other employees benefit plans; and management of custodian and agency accounts.

28. If called to testify, the officers of Clayton Trust and County Bank would testify substantially as follows:

The operation by Mercantile of its trust office in Clayton constitutes a serious obstacle to each party in its efforts to obtain new customers for its trust business from the Clayton area and from adjacent areas. New trust business acquired by Mercantile through the activities of its personnel located at its trust office in Clayton deprives each of said parties of the opportunity to obtain such business for itself. Neither of said parties can measure accurately the amount of its monetary damages, or its

future damages, caused by the continuing existence of the Clayton trust office of Mercantile and neither has any way to prevent the damage of such competition or to be compensated therefor.

29. St. Louis Union Trust Company is a corporation organized under the Missouri laws relating to banks and trust companies with its principal office at 510 Locust Street in the City of St. Louis, Missouri. It is engaged in the trust business but does not exercise any banking functions. On June 3, 1970 St. Louis Union Trust Company made written application to the Missouri Commissioner of Finance for approval to lease and use premises in Clayton, Missouri for the conduct of specified activities. A copy of that application is attached as Stipulation Exhibit 11. On or about June 10, 1970 the Commissioner of Finance notified St. Louis Union Trust Company of its disapproval of the request to the extent that the Clayton premises would be operated as a facility accessible to the public. A copy of the Commissioner's letter is attached as Stipulation Exhibit 12. Thereafter, St. Louis Union Trust Company filed suit in the Circuit Court of Cole County for review of the decision of the Commissioner of Finance; the litigation terminated with the decision of the Missouri Court of Appeals, Kansas City District, on April 2, 1973 reported in 494 S.W. 2d 408. Motion for rehearing and/or transfer to the Missouri Supreme Court was denied on May 7, 1973.

30. Attached hereto and incorporated by reference is Stipulation Exhibit 13, setting forth the chronology of actions taken in response to Mercantile's opening of its trust office on February 2, 1970, together with copies of correspondence and attachments thereto.

31. Mercantile's trust office in Clayton, Missouri is not a separate corporation or legal entity, but is an office operated by Mercantile Trust Company National Association which operates its main banking house located in the City of St. Louis,

Missouri and is an office subordinately operated by Mercantile from downtown St. Louis, Missouri, and is a part of Mercantile's organization.

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1407

MERCANTILE TRUST COMPANY NATIONAL ASSOCIATION,
Petitioner,

v.

ST. LOUIS COUNTY NATIONAL BANK, CLAYTON TRUST COMPANY, and WILLIAM R. KOSTMAN, Director of the Division of Finance for the State of Missouri,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT

St. Louis County National Bank, in Opposition

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT

St. Louis County National Bank, in Opposition

OPINIONS BELOW

The opinion of the District Court (Appendix A of Petition) is reported at 420 F.Supp. 510. The opinion of the Court of Appeals for the Eighth Circuit, and the dissenting opinion (Appendix B of Petition) are reported at 548 F.2d 716.

PRELIMINARY STATEMENT

Pursuant to U.S. Sup. Ct. Rule 40(3), 28 U.S.C.A., Respondent accepts Petitioner's statement of jurisdictional requisites, statutes involved, questions presented for review, and statement of the case.

REASONS FOR DENYING THE WRIT

I

The Court of Appeals in Holding That a Trust Office Where No Deposits Are Received or Checks Paid or Money Lent Is a Branch Under Section 36(f) of the National Bank Act Has Correctly Applied Federal Law in Upholding the Principle of Competitive Equality as Expressed by the Congress and Is Not in Conflict With Any Decision of This Court or the Courts of Appeals.

Petitioner asserts that the divided opinion below which finds a branch to exist under Section 36(f) of the National Bank Act where the activity in question did not involve the receipt of deposits, the payment of checks or the lending of money is "a case of first impression in our courts" (Petition p. 11); that the court below indulged in an "expansive reading of the federal definition of 'branch' " as a result of the majority's "zeal to maintain perfect competitive equality"; and that such a result is "demonstrably wrong and is in conflict with the applicable decisions of this Court" (Petition p. 14).

Petitioner further complains that the court's "undue emphasis on the policy of competitive equality is tantamount to assigning an indispensable role to state law in its decision that the trust office was a branch" (Petition p. 15) and that this court in *First National Bank in Plant City, Fla. v. Dickinson*, 396 U.S. 122 (1969) settled the question that state law comes into play only in deciding "how, where and when" branches may be operated and that state law has no part to play in the definition of branch. Petitioner further contends "confusion continues" and that it is time for this Court to settle the confusion (Petition p. 18).

On the contrary, the opinion below (Petition, Appendix B, p. A-14) is consistent with the statutory definition of "branch" 12 U.S.C. § 36(f) and the principle of competitive equality and is not in conflict with any decision of this Court or the Courts of Appeals.

James E. Smith, appellant below, as Comptroller of the Currency of the United States, is charged with the responsibility for the execution and regulation of the National Bank Act, 12 U.S.C. §§ 1, et seq., and all other laws relating to national banks. The Comptroller does not believe the questions presented to be sufficiently important to national banks throughout the country or to the proper administration of the National Bank Act to ask this Court to review the decision below. Only Petitioner Mercantile Trust Company, a national bank in competition with Respondents St. Louis County National Bank, also a national banking entity, and Clayton Trust Company, a state bank, seeks a rehearing by petition for Writ of Certiorari.

This court in *First National Bank in Plant City, Fla. v. Dickinson*, 396 U.S. 122 (1969), stated:

> "The policy of competitive equality is therefore firmly embedded in the statutes governing the national banking system." (l.c. 133)

It appears from the decision that in the context of that litigation all parties were in agreement that federal law alone applied to whether the challenged activity fell within the definition of "branch" as stated in 12 U.S.C. § 36(f). See 396 U.S. l.c. 133 footnote 7. Chief Justice Burger speaking for this Court agreed that this "threshold" question was to be determined by Federal law. However, he cautioned that the question must be determined having in mind the congressional intent that so far as branch banking is concerned "the two ideas [unit bank and branch banking] shall compete on equal terms and only where

the States [allow] their own institutions [to] have branches" (l.c. 134).

In *Dickinson*, supra, the plaintiff bank and the Comptroller had urged, as does Petitioner here, a restrictive meaning to the definition of branch banking. In *Dickinson*, it was argued that because of the "carefully drawn" contracts with plaintiff's customers who used the armored car or deposit receptacle services, the challenged activities did not constitute a "branch * * * at which deposits are received, or checks paid, or money lent." The Court rejected this argument saying:

> "* * * In short, the definition of 'branch' in § 36(f) must not be given a restrictive meaning which would frustrate the congressional intent this Court found to be plain in Walker Bank, supra: [385 U.S. 252]
>
> * * * * * * *
>
> "Although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term 'branch'; by use of the word 'include' the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term 'branch bank' at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; *it may include more*. * * *" (396 U.S. l.c. 134, 135, emphasis added)

The opinion also states in part:

> "Because the *purpose of the statute is to maintain competitive equality*, it is relevant in construing 'branch' to *consider*, not merely the contractual rights and liabilities created by the transaction, but *all those aspects of the transaction that might give the bank an advantage in its competition for customers*. * * *" (396 U.S. l.c. 136, 137, emphasis added)

It is clear from this opinion that this Court did not regard the definition of "branch" to be limited to the receipt of deposits, payment of checks or the loan of money as those words appear in the definition section of 12 U.S.C. § 36(f). Nor did this Court regard that definition as "exclusive". Further, it is significant that this Court commented that the rejected two services offered by the plaintiff bank were "for the convenience of customers" (l.c. 125) and although the technical arrangements between the branch and its main facility may have strictly legal consequences "it does not follow that private contractual arrangements, binding on the parties under state law, determine the meaning of the language or the reach of § 36(f)" (l.c. 136). This Court held it was relevant to consider "all those aspects of the transaction that might give the bank an advantage in its *competition for customers*." (l.c. 136, emphasis added).

In his analysis of § 36(f) at the time of its enactment Representative McFadden explained the terms "branch" as including:

> "Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, *or transacting any business carried on at the main office, is a branch*."

Dickinson, supra, l.c. 134, footnote 8 quoting 68 Cong. Rec. 5816 (1927) (emphasis added).

Whereas it is the definition of "branch" in federal law which is controlling, that definition cannot be restricted to the three money functions listed in Section 36(f). The legislative history of the McFadden Act is recently set out in the scholarly opinion of Judge Wilkey in *Independent Bankers Association of America v. Smith*, 534 F.2d 921 (D.C. Cir. 1976), cert. denied 45 U.S.L.W. 3253. With reference to the McFadden Act amendment and the definitional section of 36(f) the opinion states, l.c. 932:

> "Clearly, Congress intended to include within its definition not only the typical brick-and-mortar branch bank, but also lesser bank agencies which provide only some of the services available at a traditional branch, i.e., agencies which accept deposits, cash checks, lend money, or transact any business generally carried on at the main office."

Accepting deposits, or paying checks, or lending money are not the only indicia of branch banking. The typical bank of the present time provides many other services, such as, in this case, trust services. *Driscoll v. Northwestern Nat'l Bank*, 484 F.2d 173 (8th Cir. 1973), *North Davis Bank v. First National Bank*, 457 F.2d 820, 824 (10th Cir. 1972), *State of Colorado ex rel. State Banking Board v. First National Bank of Fort Collins*, 540 F.2d 497, 499 (10th Cir. 1976).

It is clear that a state bank in Missouri would be prohibited from operating more than one place of business for the exercise of fiduciary powers. Section 362.105 subd. 1(1) and 362.107 subd. 2(5) R.S.Mo. 1969; *St. Louis Union Trust Co. v. Pemberton*, 494 S.W.2d 408 (Mo. App. 1973).

Petitioner seeks to find a conflict of decisions by citing the District Court opinion in *Continental Illinois National Bank and Trust Co. N.A. v. Lignoul* (N.D. Ill. No. 76 C 2209, filed November 9, 1976) (Petition pp. 13-14, 21). No appeal was taken in that case. A difference of opinion between a Court of Appeals and a District Court generally is not of the character of reasons which compel this Court to grant certiorari. U.S. Sup. Ct. Rule 19(1)(b). In any event, that decision is clearly distinguishable on its facts. In the first place the Continental Illinois National Bank and Trust Co. did not establish a branch in another city—it acquired property and moved its entire trust business to a facility on the same street with its main banking offices. Further, if national banks were permitted to establish off-premises trust branches in Illinois, state trust companies

would also be permitted to do so under the Illinois Banking Act, and therefore Illinois chartered commercial banks would not be placed at a competitive disadvantage to national banks in Illinois (Slip. Opin. pp. 2, 9-10). This is not the law in Missouri.

Here, the Court of Appeals was "confronted by a systematic attempt to secure for national banks" (*Dickinson*, supra, l.c. 138) branching privileges for their trust departments, which Missouri denies to competing state banks. The profitable operation of its trust department is an essential and integral part of the functioning of Mercantile Trust Company as a national *Bank*—it is part of the reality of transacting banking business. The *Dickinson* decision, upon which Mercantile places such great reliance, squarely holds that this Court will penetrate the technical form of the transaction to reach its underlying substance in order to preserve competitive equality (l.c. 137). The Court of Appeals refused to exclude the exercise of fiduciary powers and the performance of such trust services from the definition section of the McFadden Act as contrary to all reason because it would mean that a national bank performing fiduciary functions is no longer subject to the reasonable and non-discriminatory provisions of state laws regulating the exercise of such powers as to state banks and trust companies. The "harmony and concordant exercise of national and state power" would no longer exist. *First National Bank v. Fellows ex rel. Union Trust Company*, 244 U.S. 416, 427 (1917).

There is nothing in the *Dickinson* decision to support the contention that this Court would give so restrictive a meaning to the definition to hold that a branch trust office is not a branch under Section 36(c) and (f) or that this Court would deviate from its holding in that case that local state policy "is not open to judicial review any more than is the congressional policy of 'competitive equality'. Nor is the congressional policy

of competitive equality with its deference to state standards open to modification by the Comptroller of the Currency." (l.c. 138).

II

The Court of Appeals in Holding That Mercantile Trust Company's Exercise of Fiduciary Powers at a Branch Office Contravened State Law and Violated Section 92a of the National Bank Act Correctly Applied the Law as Announced by This Court and the Courts of Appeals.

Section 92a of the National Bank Act was first enacted in 1913 as paragraph 11(k) of the Federal Reserve Act, 12 U.S.C. § 248(k). It has long been held that the Congressional policy of competitive equality was incorporated into section 92a with reference to the exercise of fiduciary powers by national banks. *First National Bank v. Fellows ex rel. Union Trust Company*, 244 U.S. 416 (1917); *Missouri ex rel. Burnes National Bank v. Duncan*, 265 U.S. 17 (1924); *Blaney v. Florida National Bank*, 357 F.2d 27, 30 (5th Cir. 1966); *American Trust Co. v. South Carolina State Board of Bank Control*, 381 F.Supp. 313, 323 (D.S.C. 1974); *New Hampshire Bankers Ass'n v. Nelson*, 336 F.Supp. 1330, 1334 (D.N.H. 1972), aff'd 460 F.2d 307 (1st Cir.), cert. denied 409 U.S. 1001 (1972).

The location of the exercise of fiduciary powers is an essential factor inherent in applying the standard of competitive equality with respect to such powers as well as customary banking powers referred to in 12 U.S.C. §36(c) and (f). Clearly it was not the intention of Congress that the right to exercise fiduciary powers "when not in contravention of state or local law" be granted in a vacuum unrelated to and independent of location. The state law of Missouri, as found in section 362.105 subd. 1(1) and section 362.107 subd. 2(5) R.S.

Mo. 1969 and *St. Louis Union Trust Co. v. Pemberton*, supra, is clear that a state bank in Missouri is prohibited from operating more than one *place of business* for the exercise of fiduciary powers. State law has been used by Congress in the National Bank Act to provide certain guidelines to implement its legislative policy, and the mechanism of referring to state law is designed to build into the federal statute a self-executing provision to accommodate to state regulation. *First National Bank v. Dickinson*, supra, l.c. 131, 133; *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966).

The Court of Appeals decided that the State of Missouri's power to nondiscriminatorily limit the location where fiduciary powers may be exercised is implicit in the state's power to proscribe national banks from exercising such fiduciary powers when in contravention of state or local law. This decision does not raise a special and important question not heretofore determined. On the contrary that decision is in accord with Federal law and the decisions of this Court and other Federal courts.

> "If a state has historically chosen not to allow branch banking because of a general fear of 'bigness' and large concentration of power, there is every evidence that Congress and the Supreme Court regard this decision as the state's prerogative. * * * This frustration of state policy was not the intent of Congress in the National Bank Act nor the intent of the Supreme Court in *Walker Bank* and *Plant City* [First National Bank v. Dickinson]. Properly construed the National Bank Act and the policy of competitive equality leave to the states the question of branching and its inherent advantages and disadvantages."

Independent Bankers Ass'n of America v. Smith, 534 F.2d 921, 936 (D.C. Cir. 1976), cert. denied 45 U.S.L.W. 3253. The decision below again holds that a state is entitled to have its laws respected in such great policy matters as this.

III

The Decision of the Court of Appeals Is Limited to Facts Before That Court Concerning the Exercise of Fiduciary Powers at a Place Separate and Apart From the Main Banking House of Mercantile Trust Company.

Petitioner asserts that the decision of the Court of Appeals extends beyond the operation of a trust office by a national bank and will have an impact on the conduct of other off-premises banking facilities and activities, such as loan production offices, new business solicitation, loan closings, leasing, mortgage banking, data processing, investment advice, credit card services and various bank correspondent services (Petition, pp. 22-23).

Whether or not such banking activities are prohibited by the National Bank Act, 12 U.S.C. §§36(c), 36(f) and 92a and the law of Missouri, was not before the Court below nor decided by its opinion. The decision below was directed to the sole question whether a national bank could establish a branch trust office in another city apart from the city in which its main banking house was located for the transaction of trust business, which was part of its general banking business. *First National Bank v. Fellows ex rel. Union Trust Company*, 244 U.S. 416 (1917); *Missouri ex rel. Burnes National Bank v. Duncan*, 265 U.S. 17 (1924).

There is no fixed test for determining what constitutes a branch bank. Each case must be considered on its own facts. *North Davis Bank v. First Nat'l Bank*, 457 F.2d 820, 824 (10th Cir. 1972). The Court below reviewed the record before it. See opinion reported at 548 F.2d 716, 719, Petition Appendix B, p. A-20. The basis of the Court's decision is stated as follows:

> "Turning to the record before us we note that Mercantile's main office in St. Louis conducts a substantial amount of trust business. The activities performed by Mercantile at its Clayton office are summarized as follows: * * * It is apparent that *these enumerated qctivities* are also carried on routinely at Mercantile's main office. * * * *In the light of these factors*, we hold that the establishment of such a permanent place of business as undertaken by Mercantile is a branch as contemplated by Section 36(f)." (emphasis added)

Whether the off-premises activity suggested by Petitioner at pages 22-23, supra, is prohibited by the National Bank Act as suggested in *Independent Bankers Association of America v. Smith*, 534 F.2d 921, 931 (D.C. Cir. 1976), or would be held to be only the exercise of incidental powers by a national bank, cf. *First National Bank in St. Louis v. State of Missouri ex rel. Barrett*, 263 U.S. 640, 659 (1924), or merely some extension of the main bank and not a branch, cf. *Nebraskans for Independent Banking v. Omaha National Bank*, 530 F.2d 755, 760 (8th Cir. 1976), was not before the Court of Appeals nor decided by its opinion. Petitioner's argument would require consideration of many facts totally outside of this record.

The opinion below does not reach the basic principle that there are certain activities which are incidental to the business of banking which can be performed legally apart from the main banking house, without raising the question of branching. The court found the Petitioner had established as a branch office a permanent place of business, with a permanent staff, for the purpose of obtaining new customers for its trust department and conducting trust business first as carried on at its main office in competition with state banks which were prohibited by state law from doing so. The Court of Appeals, based on these facts, held that the establishment of such a permanent place of business as established by Mercantile Trust Company was a large step across the line dividing the legal from the illegal

transaction of business and thus violated and frustrated the very purpose of the McFadden Act which is to maintain competitive equality between state and national banks.

CONCLUSION

For the reasons stated and upon the authorities cited herein this cause should not be reviewed by this Court and the petition of Mercantile Trust Company for Writ of Certiorari should be denied.

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1407

MERCANTILE TRUST COMPANY NATIONAL ASSOCIATION,
Petitioner,

v.

ST. LOUIS COUNTY NATIONAL BANK, CLAYTON TRUST COMPANY and WILLIAM R. KOSTMAN, Director of the Division of Finance for the State of Missouri.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

Clayton Trust Company in Opposition to Petition for Certiorari

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OPINIONS BELOW

The opinion of the Court of Appeals was filed on December 16, 1976; petitions for rehearing were denied on January 31, 1977. The opinion of the Court of Appeals is reported in 548 F. 2d 716; the opinion of the District Court is reported in 420 F. Supp. 510. Both are appended to the petition.

JURISDICTION

This respondent does not question the jurisdiction as set forth in the petition.

STATUTES INVOLVED

Federal Statutes: 12 U.S.C. § 36(c); 12 U.S.C. § 36(f); 12 U.S.C. § 92a.

Pertinent parts of these statutes are quoted in the petition. Sec. 92a is set out in full in the appendix to this brief.

Missouri Statutes: Vernon's Annotated Missouri Statutes. Sec. 362.105-1(1):

". . .; provided, however, that no bank or trust company shall maintain in this state a branch bank or trust company, or receive deposits or pay checks except in its own banking house or as provided in section 362.107;"

Sec. 362.107-5:

"Nothing contained in this section shall be deemed to authorize the maintenance or operation of a branch bank or a branch trust company in contravention of the prohibition contained in section 362.105."

Sec. 362.107-6:

"National banking associations located in this state have the same but no greater right under or by virtue of this section as banks and trust companies organized under the laws of this state."

QUESTIONS PRESENTED

1. Whether the doing of trust business by petitioner at its trust office in the City of Clayton, Missouri, eight miles distant from its main banking office and trust department in St. Louis, Missouri, makes the Clayton office a "branch" within the meaning of 12 U.S.C. § 36?

2. Whether the conduct of trust business at petitioner's trust office in Clayton, in addition to its main trust office in St. Louis, is a violation of 12 U.S.C. § 92a because Missouri statutes prohibit a state bank or a state trust company from having more than one office for carrying on trust business with the public?

STATEMENT OF THE CASE

The statement of the case in the petition is satisfactory with these additions.

The Comptroller of the Currency took a separate appeal from the judgment of the District Court in this case. His appeal was docketed in the Court of Appeals as No. 76-1709 and consolidated with the appeal by Merçantile, No. 76-1603. The opinion of the Court of Appeals decided both appeals and the orders entered on January 31, 1977 denied the separate petitions of Mercantile and of the Comptroller for rehearing. The Comptroller has not asked this Court to review the judgment below.

The Missouri statutes which prohibit a branch bank or trust company, V.A.M.S. Secs. 367.105-1(1) and 362.107-5, have been held to prohibit a Missouri bank or trust company from exercising its fiduciary powers at more than one place of business.

St. Louis Union Trust Company v. Pemberton, 494 S.W. 2d 408 (Mo. Ct. App., 1973).

ARGUMENT

The writ should be denied for the following reasons:

1. The decision below is not in conflict with the decision of any other Court of Appeals or of this Court on the questions presented.

2. The Comptroller of the Currency is a party in the case in the Court of Appeals. He has not filed a petition for certiorari in this Court and the time for doing so has expired. The Comptroller has statutory responsibility for supervision of national banks and administration of the national banking laws (12 U.S.C. §1 et seq.). If the Comptroller has a serious concern that the result reached by the Court of Appeals would affect adversely his proper administration of the national banking laws he would be expected to seek a review of the decision. His failure to do so suggests that in his opinion the decision below will not have a harmful impact on the activities of national banks or on his ability to discharge the duties of his office.

The absence of the responsible government officer from the case at this stage undercuts petitioner's argument that an important federal question has been decided wrongly.

3. The decision below finds that the operation of multiple trust offices by petitioner (a national bank) violates two separate sections of the national banking laws: §36, as to the conditions upon which a national bank may establish a branch, and §92a, as to the application of state law to the exercise of trust powers by a national bank. Although the holding on the §36 "branch" issue is well within the principles enunciated by this Court in *First National Bank v. Dickinson*, 396 U.S. 122 (1969), and *First National Bank of Logan v. Walker Bank and Trust Co.*, 385 U.S. 252 (1966), the result reached by the

Court of Appeals is sustained independently by reason of the §92a violation.

The principle of federal law involved in the §92a ruling is clear, requiring no new review by this Court to be settled. The policy of competitive equality between state and national banks is incorporated into §92a by its application of non-discriminatory state regulations to the conduct of trust business by national banks within the state. The policy is found in the express language of the statute and is recognized by court decisions, by administrative regulations, by other parts of §92a and by its legislative history.

Court Decisions:

First National Bank of Bay City v. Fellows, 244 U.S. 416 (1917);

New Hampshire Bankers Association v. Nelson, 460 F.2d 307 (1 Cir. 1972), cert. den. 409 U.S. 1001 (1972);

Blaney v. Florida National Bank at Orlando, 357 F.2d 27 (5 Cir. 1966);

American Trust Company, Inc. v. South Carolina State Board of Bank Control, 381 F. Supp. 313 (D.C., S.C. 1974).

Administrative Regulations:

The statutory policy of competitive equality in the exercise of trust powers, upheld by the Court of Appeals in this case, is confirmed by the Comptroller's own regulations which he promulgates under the authority of 12 U.S.C. §92a (j) to control "the proper exercise of the powers granted" to national banks by §92a. A number of those regulations use the state or local law as the *measure* of the extent of authority or restric-

tion contained in the federal regulation for exercise of fiduciary powers by a national bank. See 12 C.F.R., Secs. 9.1(d), 9.3(a), 9.10(b), 9.11(a), 9.14, 9.15 and others.

Other Parts of §92:

Other subsections of §92a incorporate particular provisions of state law to apply to the exercise of trust powers by national banks, such as subsections (f), (g) and (i).

Legislative History:

House Report 479, 65th Congress, Second Session, April 9, 1918, which describes the 1918 amendments to Sec. 11 (k) of the Act (now § 92a), states:

> "These provisions are intended to impose safeguards upon the exercise of these fiduciary powers by national banks, and to have national banks in the exercise of those powers conform as fully as is practicable with State requirements."

The district court decision quoted by petitioner, *Continental Illinois Bank and Trust Co. N.A. v. Lignoul*, is consistent with the decision below on the § 92a question. The district judge, in ruling that the national bank in Illinois could move its entire trust department to a separate location from its banking house, found that Illinois law allows state trust companies to have multiple branches or offices for trust business. The ruling recognizes that in Illinois a separate trust office is not in contravention of state law, so the policy of competitive equality gives the same right to the national bank in Illinois. In contrast, Missouri law does not permit state banks or trust companies to have multiple offices for trust business. National banks in Missouri must conform with this non-discriminatory state requirement.

CONCLUSION

The construction placed on § 92a by the court below is consistent with the plain meaning of the statute, and with its dominant purpose to maintain competitive equality between national and state banks in the conduct of trust business. This purpose has been followed without conflict in authority by the federal courts and by the administrative regulations of the Comptroller. Further review by this Court is not warranted.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Text of 12 U.S.C. § 92a

12 U.S.C. § 92a:

(a) The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

(b) Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this section.

(c) National banks exercising any or all of the powers enumerating[1] in this section shall segregate all assets held in any fiduciary capacity from the general assets of the bank and shall keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this section. The State banking authorities may have access to reports of examination made by the Comptroller of the Currency insofar as such reports relate to the trust department of such bank, but nothing in this section shall be construed as authorizing the State banking authorities to examine the books, records, and assets of such bank.

(d) No national bank shall receive in its trust department deposits of current funds subject to check or the deposit of checks,

drafts, bills of exchange, or other items for collection or exchange purposes. Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Comptroller of the Currency.

(e) In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank.

(f) Whenever the laws of a State require corporations acting in a fiduciary capacity to deposit securities with the State authorities for the protection of private or court trusts, national banks so acting shall be required to make similar deposits and securities so deposited shall be held for the protection of private or court trusts, as provided by the State law. National banks in such cases shall not be required to execute the bond usually required of individuals if State corporations under similar circumstances are exempt from this requirement. National banks shall have power to execute such bond when so required by the laws of the State.

(g) In any case in which the laws of a State require that a corporation acting as trustee, executor, administrator, or in any capacity specified in this section, shall take an oath or make an affidavit, the president, vice president, cashier, or trust officer of such national bank may take the necessary oath or execute the necessary affidavit.

(h) It shall be unlawful for any national banking association to lend any officer, director, or employee any funds held in trust under the powers conferred by this section. Any officer, director, or employee making such loan, or to whom such loan is made, may be fined not more than $5,000, or imprisoned not more

than five years, or may be both fined and imprisoned, in the discretion of the court.

(i) In passing upon applications for permission to exercise the powers enumerated in this section, the Comptroller of the Currency may take into consideration the amount of capital and surplus of the applying bank, whether or not such capital and surplus is sufficient under the circumstances of the case, the needs of the community to be served, and any other facts and circumstances that seem to him proper, and may grant or refuse the application accordingly: *Provided*, That no permit shall be issued to any national banking association having a capital and surplus less than the capital and surplus required by State law of State banks, trust companies, and corporations exercising such powers.

(j) Any national banking association desiring to surrender its right to exercise the powers granted under this section, in order to relieve itself of the necessity of complying with the requirements of this section, or to have returned to it any securities which it may have deposited with the State authorities for the protection of private or court trusts, or for any other purpose, may file with the Comptroller of the Currency a certified copy of a resolution of its board of directors signifying such desire. Upon receipt of such resolution, the Comptroller of the Currency, after satisfying himself that such bank has been relieved in accordance with State law of all duties as trustee, executory, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics or other fiduciary, under court, private or other appointments previously accepted under authority of this section, may, in his discretion, issue to such bank a certificate certifying that such bank is no longer authorized to exercise the powers granted by this section. Under the issuance of such a certificate by the Comptroller of the Currency, such bank (1) shall no longer be subject to the provisions of this section or the regulations of the Comptroller

of the Currency made pursuant thereto, (2) shall be entitled to have returned to it any securities which it may have deposited with the State authorities for the protection of private or court trusts, and (3) shall not exercise thereafter any of the powers granted by this section without first applying for and obtaining a new permit to exercise such powers pursuant to the provisions of this section. The Comptroller of the Currency is authorized and empowered to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein. Pub. L. 87-722, § 1, Sept. 28, 1962, 76 Stat. 668.

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MERCANTILE TRUST COMPANY NATIONAL ASSOCIATION,
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ST. LOUIS COUNTY NATIONAL BANK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE COMPTROLLER OF THE CURRENCY

WADE H. MCCREE, JR.,
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Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

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1. Petitioner is a national banking association whose principal office is located in St. Louis, Missouri.[1] It is engaged in the banking business and operates a trust department. In February 1970, petitioner opened a trust information office in Clayton, Missouri, a suburb of St. Louis. Prior to opening the Clayton office, petitioner had received notice from the Comptroller of the Currency of the United States that the Comptroller had no objection to the establishment of the trust office "as long as you do not accept deposits, make loans, or pay checks at the location,

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[1]The facts of this case, which are not in dispute, are contained in a stipulation set forth in Pet. App. A-32 to A-47.

thereby bringing it within the definition of a branch office as set forth in 12 U.S.C. 36(f)" (Pet. 7). No banking services are performed at petitioner's trust office in Clayton; no deposits are received, no money is lent, and no checks are paid.

Respondent St. Louis County National Bank commenced this action for declaratory and injunctive relief claiming that petitioner's Clayton trust office was illegal under 12 U.S.C. 36(c) and 92a.[2] The former provision contains restrictions upon the locations where a national bank may establish facilities that are "branches" within the meaning of 12 U.S.C. 36(f), and the latter provision authorizes the Comptroller of the Currency to grant a national bank the right to act in fiduciary capacities. The Comptroller was joined as a defendant in the case.[3]

The district court held that petitioner's trust office was a branch within the meaning of 12 U.S.C. 36(f), and that since under a state court decision a state-chartered bank in Missouri would be unable to operate the same type of facility (see Pet. App. A-16), petitioner's trust office was illegal under 12 U.S.C. 36(c) (Pet. App. A-12). The district court also held that the operation of the trust office violated 12 U.S.C. 92a (Pet. App. A-12 to A-13). The court enjoined petitioner from further operating its trust office (Pet. App. A-13).

The court of appeals affirmed (Pet. App. A-14 to A-25). It ruled that "the three routine banking functions delineated in section 36(f) are not the only indicia of branch

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[2]The language of these provisions, as well as the statutory definition of "branch" contained in 12 U.S.C. 36(f), are set forth at Pet. 3-4.

[3]The Clayton Trust Company and the Director of the Division of Finance for the State of Missouri were permitted to intervene as plaintiffs.

banking" and that "each case must be considered on its own facts to determine if a branch exists" (Pet. App. A-20). An evenly divided court of appeals denied the Comptroller's petition for rehearing and suggestion for rehearing *en banc* (Pet. App. A-27).[4]

2. It is the Comptroller's position that the decision of the court of appeals is incorrect, generally for the reasons stated in the petition and the dissenting opinion of Judge Henley. The Comptroller has long maintained the view that a facility of a bank that does not receive deposits, cash checks, or lend money is not a "branch" within the meaning of federal law and thus is not subject to the limitations in 12 U.S.C. 36(c). Moreover, 12 U.S.C. 92a, which limits the Comptroller's authority to grant national banks the right to act in fiduciary capacities, is intended as a limitation upon a bank's right to act in those capacities at all, and not as a limitation upon the locations where the right can be exercised.

However, the court of appeals' decision in this case appears to be one of first impression in the appellate courts, and although it is potentially an important decision, its likely practical impact, since the case turns "on its own facts" (Pet. App. A-20), is not clear. The Comptroller therefore believes that it would be appropriate to await further consideration of the issues in the lower courts before deciding to seek review in this Court. If the instant petition is granted, the Comptroller intends to

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[4]The court of appeals also denied petitioner's petition for rehearing *en banc* (Pet. App. A-26).

defend his determination that petitioner's trust office is legal.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.